COLUMBIA LAW REVIEW

VOL. 124 **JANUARY 2024** **NO. 1**

COLUMBIA LAW REVIEW

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ABSTRACTS

ARTICLE

On January 1, 2022, the Arizona Supreme Court announced the most radical change to the American jury in nearly thirty-five years: the elimination of peremptory strikes. Arizona's move is part of a broader trend of states experimenting with new ways to counter racial exclusion in the selection of juries after decades of federal inaction. Perhaps as noteworthy as the reforms themselves is the way in which many have come about: Rather than announcing new constitutional rules or awaiting legislation, state courts have wielded their rulemaking authority to quietly change how juries are constituted.

This Article makes four contributions. First, it situates the recent wave of rulemaking in historical context, revisiting the century-long conflict between state judiciaries and legislatures for control over criminal procedure. Second, it provides a comprehensive account of the state-level reforms to jury selection, situating these developments as a response to the U.S. Supreme Court's anemic efforts to counter racial exclusion, tracking how the reforms have built upon one another, and highlighting how they depart from federal antidiscrimination doctrine. Third, it describes Arizona's historic abolition of peremptory strikes, drawing largely upon original interviews with key actors, including the Chief Justice of the Arizona Supreme Court. It surfaces a surprising explanation for why the overwhelmingly conservative court eliminated peremptory strikes altogether: Many perceived the reforms undertaken elsewhere as "too woke." Finally, it offers a detailed analysis of the legal landscape throughout the fifty states, exploring where ambitious state supreme courts could undertake further reforms to jury selection or criminal procedure more broadly.

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VOL. 124 **JANUARY 2024** **NO. 1**

COLUMBIA LAW REVIEW

VOL. 124 JANUARY 2024 NO. 1

ARTICLE

THE END OF *BATSON*? RULEMAKING, RACE, AND CRIMINAL PROCEDURE REFORM

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On January 1, 2022, the Arizona Supreme Court announced the most radical change to the American jury in nearly thirty-five years: the elimination of peremptory strikes. Arizona's move is part of a broader trend of states experimenting with new ways to counter racial exclusion in the selection of juries after decades of federal inaction. Perhaps as noteworthy as the reforms themselves is the way in which many have come about: Rather than announcing new constitutional rules or awaiting legislation, state courts have wielded their rulemaking authority to quietly change how juries are constituted.

This Article makes four contributions. First, it situates the recent wave of rulemaking in historical context, revisiting the century-long conflict between state judiciaries and legislatures for control over criminal procedure. Second, it provides a comprehensive account of the state-level reforms to jury selection, situating these developments as a response to the U.S. Supreme Court's anemic efforts to counter racial exclusion, tracking how the reforms have built upon one another, and highlighting how they depart from federal antidiscrimination doctrine. Third, it describes Arizona's historic abolition of peremptory strikes, drawing largely upon original interviews with key actors, including the Chief Justice of the Arizona Supreme Court. It surfaces a surprising

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explanation for why the overwhelmingly conservative court eliminated peremptory strikes altogether: Many perceived the reforms undertaken elsewhere as "too woke." Finally, it offers a detailed analysis of the legal landscape throughout the fifty states, exploring where ambitious state supreme courts could undertake further reforms to jury selection or criminal procedure more broadly.

INTRODUCTION

On January 1, 2022, the most radical change to the American jury in at least thirty-five years occurred in Arizona: Peremptory strikes, long a feature of American trial adjudication, were eliminated.[1] Arizona has gone furthest, but it is not alone in reforming the law of jury selection in fundamental ways. In the span of just a few years, four other states—California, Connecticut, New Jersey, and Washington—have overhauled their approach to peremptory strikes, and others are considering doing the same.[2] Under the U.S. Supreme Court's 1986 decision in *Batson v. Kentucky* and its progeny, peremptory strikes substantially motivated by a

1. See infra Part III.
2. See infra sections II.B.1–.2.

prospective juror's race[3] or sex[4] violate the Equal Protection Clause. But the new reforms are different in subtle though important ways: Most notably, they proscribe certain justifications for peremptory strikes that would disproportionately exclude protected classes from service, even when the proponent's actual subjective motivation is pristine.[5] Nearly one-fifth of the country's population now lives in a jurisdiction where *Batson v. Kentucky*'s familiar three-part framework[6] no longer governs the validity of a peremptory strike.[7]

These new legal frameworks are sometimes called "*Batson*-plus" regimes, insofar as they mandate heightened scrutiny of whether a peremptory strike is impermissibly discriminatory.[8] But this label elides the ways in which these states' new laws reject core features of the U.S. Supreme Court's decision in *Batson v. Kentucky* and its equal protection jurisprudence more generally: The new laws focus on disparate outcomes rather than discriminatory intent, ordinarily the *sine qua non* of modern constitutional discrimination claims.[9] Surveying the "racial common sense" of the Roberts Court in her recent *Harvard Law Review* Foreword, Professor Khiara M. Bridges argues that "nonwhite people cannot expect the courts to intervene in the race-neutral processes that do most of the heavy lifting of reproducing racial disadvantage and reiterating racial

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3. 476 U.S. 79, 89 (1986).

4. J.E.B. v. Alabama, 511 U.S. 127, 129–31 (1994).

5. See infra section II.B.

6. As the U.S. Supreme Court has summarized the framework:

> Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

Purkett v. Elem, 514 U.S. 765, 767 (1995) (per curiam).

7. Specifically, approximately sixty-seven million people—about eighteen percent of the U.S. population—live in the five states (Arizona, California, Connecticut, New Jersey, and Washington) that have adopted these reforms. See U.S. Census Bureau, Annual Estimates of the Resident Population for the United States, Regions, States, District of Columbia and Puerto Rico: April 1, 2020 to July 1, 2022 (Dec. 2022), https://www.census.gov/data/tables/time-series/demo/popest/2020s-state-total.html (spreadsheet on file with the *Columbia Law Review*) (providing 2022 national and state-level population estimates); infra section II.B.1 (discussing the states that have made reforms).

8. See, e.g., Peter B. Swann & Paul J. McMurdie, Petition at 14, In re Petition to Amend Rules 18.4 & 18.5 of the Ariz. Rules of Crim. Proc. & Rule 47(e) of the Ariz. Rules of Civ. Proc., No. R-21-0020 (Ariz. filed Jan. 11, 2021), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=9375 [https://perma.cc/7P37-ESRW] [hereinafter Swann & McMurdie Petition] ("[A] Washington-style '*Batson* plus' approach will [not] be effective enough . . . .").

9. See Washington v. Davis, 426 U.S. 229, 248 (1976) (declining to invalidate facially neutral state action based on racially disparate outcomes); infra section II.B.

hierarchy in the post-Civil Rights Era."[10] The recent state-level reforms should be understood against this backdrop as a reaction (albeit a limited one) to the yawning gap between the U.S. Supreme Court's periodic pronouncements that racial exclusion in jury selection is "at war with our basic concepts of a democratic society and a representative government"[11] and the lived reality of its racial justice jurisprudence.[12]

This trend is noteworthy on its own, but equally important is *how* these major criminal procedure reforms are occurring. In Arizona and nearly all the other states that have adopted new jury selection regimes, state supreme courts have not waited for their legislatures to pass new statutes; nor, in the ordinary course of deciding appeals, did they construe state or federal constitutions to require these new procedures. Rather, state supreme courts have increasingly turned to rulemaking, wielding their traditional authority to control matters of procedure through the promulgation of court rules.[13] Opponents have criticized the recent reforms not just as poor policy but also as examples of judicial overreach. Legislators in Arizona, for example, accused the Arizona Supreme Court of usurping their authority to determine substantive law in the state.[14] But nothing about these state supreme courts' recent assertions of rulemaking power or the critiques is particularly novel: At various times over the past century, state judiciaries and legislatures have been in dialogue (and sometimes open conflict) over how the rules of American criminal procedure ought to be authored.[15] When thinking about what courts "do" nowadays—and, in particular, how they regulate criminal procedure—we have grown accustomed to privileging federal courts, federal constitutional doctrine, and the federal adjudicatory process. But for the vast majority of criminal defendants, rules promulgated by state supreme courts are often the primary force shaping not only jury selection but every aspect of their interaction with the adjudicatory system.[16] Indeed, in most jurisdictions in

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10. Khiara M. Bridges, The Supreme Court, 2021 Term—Foreword: Race in the Roberts Court, 136 Harv. L. Rev. 23, 31 (2022).

11. Smith v. Texas, 311 U.S. 128, 130 (1940).

12. See Bridges, supra note 10, at 31 (characterizing the record as "ghastly"). But see Daniel S. Harawa, Lemonade: A Racial Justice Reframing of the Roberts Court's Criminal Jurisprudence, 110 Calif. L. Rev. 681, 685 (2022) ("While racial justice advocates can rightly take a negative view of this line of cases, viewing them as lemons, this Article recasts the cases as tools in the fight for racial justice, exploring how these lemons can be turned into lemonade.").

13. See infra Part II (discussing developments in various states); infra Part III (focusing on Arizona). California, which also developed its new rules through legislation, is the exception. See infra notes 165–180 and accompanying text.

14. See infra notes 312–322 and accompanying text (discussing Arizona's H.B. 2413 and the legislative effort to reinstate peremptory strikes).

15. See infra Part I.

16. See, e.g., infra notes 19–23 (discussing the use of procedural rules to govern pretrial diversion and expungement of convictions).

the United States, state supreme courts have long enjoyed broad authority under state constitutional law (sometimes supplemented by statutory delegations) to act as quasi-legislatures, drafting and promulgating procedural rules as they best see fit. Such rules govern everything from pretrial diversion programs[17] to the expungement of convictions,[18] and everything in between.[19]

Perhaps it is unsurprising, then, that scholars and activists are beginning to think about judicial rulemaking as a vehicle for achieving reforms that constitutional litigation or legislative advocacy have failed to deliver. In recent years, scholars focused on ending mass incarceration and reducing racial disparities in criminal justice have begun to recognize the importance of rulemaking, urging courts to promulgate new rules allowing judges to dismiss cases "in the interest of justice"[20] or to expand discovery to allow easier detection of discriminatory policing patterns.[21] State supreme courts have recently begun "to address the problems associated with fees, fines, and bail" through rulemaking, as Professor Jane S. Schacter has observed.[22] Most notably, Professor Andrew Manuel Crespo has meticulously excavated how the subconstitutional state law of criminal procedure, encompassing both statutory law and court-promulgated rules, supplies a "hidden law" that "establishes the mechanisms and legal frameworks through which prosecutorial . . . power is generated and deployed" in the context of plea bargaining.[23] And it is not just scholars who are devoting renewed attention to the issue: In 2018, dissatisfaction over the Ohio Supreme Court's failure to approve a proposed rule regarding plea bargaining spurred an insurgent candidate's (successful) bid for a seat on the court.[24]

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17. See State v. Leonardis, 375 A.2d 607, 614 (N.J. 1977) (enforcing N.J. Ct. R. 3:28).

18. Key v. State, 48 N.E.3d 333, 339–40 (Ind. Ct. App. 2015) (finding no conflict between a statutory expungement procedure and a court-promulgated procedural rule).

19. See, e.g., Alaska R. Crim. P. 43(c) (allowing courts to dismiss cases sua sponte "in furtherance of justice"); Haw. R. Penal P. 16(b)(1)(vii) (establishing a standard for pretrial disclosure of exculpatory evidence that omits the "materiality" requirement of Brady v. Maryland, 373 U.S. 83, 87 (1963)).

20. Valena E. Beety, Judicial Dismissal in the Interest of Justice, 80 Mo. L. Rev. 629, 633 (2015).

21. See Alison Siegler & William Admussen, Discovering Racial Discrimination by the Police, 115 Nw. U. L. Rev. 987, 1041 (2021).

22. Jane S. Schacter, Glimpses of Representation-Reinforcement in State Courts, 36 Const. Comment. 349, 370 (2021); see also Leonard Sosnov, *Brady* Reconstructed: An Overdue Expansion of Rights and Remedies, 45 N.M. L. Rev. 171, 191 n.122 (2014) (discussing state discovery rules eliminating the "materiality" prong of the *Brady* inquiry).

23. Andrew Manuel Crespo, The Hidden Law of Plea Bargaining, 118 Colum. L. Rev. 1303, 1306 (2018).

24. See Bob Ratterman, Judicial Candidate Expresses Frustration With the Plea Bargain Process, J.-News, https://www.journal-news.com/news/local/judicial-candidate-expresses-frustration-with-the-plea-bargain-process/DEn1cDLn83Hz2m5GLIiJjJ/ [https://perma.cc/88SY-ZLQ5] (last updated July 7, 2018); see also Michael P. Donnelly, Sentencing

But if the current wave of reform around the law of the jury is to continue or expand into other facets of criminal procedure, it is essential to take a more nuanced look at how judicial rulemaking actually operates. How many other state supreme courts could promulgate rules to overhaul the use of peremptory strikes, as Washington has done? Or eliminate them altogether, as in Arizona? What if an antagonistic legislature sought to undo such reforms?[25] The answer: It depends![26] In some jurisdictions, the state supreme court's authority to promulgate rules is expressly set forth in a state constitution; in others, it has been delegated by the legislature; in a few, it does not exist at all.[27] The rulemaking authority extends to all matters of civil and criminal procedure in many states; in a few jurisdictions, though, the state supreme court is barred from promulgating rules related to particular subject matter (e.g., juries).[28] As at the federal level, state supreme courts can typically promulgate "procedural" (as opposed to "substantive") rules, but states have adopted idiosyncratic approaches to assessing the dividing line, or overlap, between the two realms.[29] And, perhaps most importantly, states have developed disparate approaches to resolving conflicts between the judiciary and the legislature: Rules trump statutes in some states, statutes trump rules in others, and in many jurisdictions the law is unclear.[30]

This Article begins in Part I by placing the current explosion of rulemaking in historical perspective. A century ago, the legal profession's leading luminaries and the ABA fought to assert the primacy of judicial rulemaking over legislative meddling, insisting that state supreme courts (re)assume their control over procedure.[31] The crowning achievement of these efforts was Congress's passage of the Rules Enabling Act in 1934, but an even more robust version of judicial rulemaking expanded in state courts throughout the early twentieth century, too.[32] Often, rulemaking in the states looked very different than its federal counterpart: In the 1950s, the New Jersey Supreme Court declared the state legislature powerless to contradict its procedural rules, prompting prominent law reviews to

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by Ambush: An Insider's Perspective on Plea Bargaining Reform, 54 Akron L. Rev. 223, 231–33 (2020) (discussing the author's state supreme court campaign).

25. See infra section IV.C (examining state law and historical practice regarding conflicts between the judiciary and the legislature over rulemaking).

26. See infra Table 1 (displaying the authors' assessment of judicial rulemaking power to unilaterally reform the use of peremptory strikes).

27. See generally infra Part IV (highlighting the vast differences across jurisdictions).

28. See infra Appendix A (showing this to be true of states such as Arkansas).

29. See infra Appendix A (surveying these differing approaches).

30. See infra Part IV (discussing the ways in which states address such conflicts).

31. See infra Part I.

32. See infra Part I.

devote full-length articles to the issue.[33] In more recent decades, state supreme courts and legislatures have occasionally engaged in open battles over rulemaking, ranging from disputes over bail in Florida[34] to "tort reform" in Arkansas.[35] Far from a novel innovation, the recent spate of reforms to peremptory strikes falls within a long tradition of conflict over rulemaking and the control of American criminal procedure.

Part II provides an assessment of the recent wave of state-level reforms to jury selection, a trend that contrasts sharply with the U.S. Supreme Court's hands-off approach to the topic in recent decades. Beginning with the Washington Supreme Court's promulgation of General Rule 37 in 2018, courts across the country have begun experimenting with various frameworks (or, in the case of Arizona, outright elimination of peremptory strikes) to better address racial exclusion, and more may soon follow suit.[36] As the Part explains, these efforts have built upon one another, with reformers and jurists looking to other jurisdictions as they have developed their own states' models. This Article does not take a stance on the comparative merits of these reform efforts, but it does seek to surface a common feature of these projects: All have targeted the use of certain "race neutral" criteria in peremptory strikes, not just because such rationales might pretextually mask subjective bias but out of recognition that such exclusion can and does independently reinscribe racial subordination.[37] In displacing the (typically futile) search for an impermissible hidden purpose on the part of a strike's proponent, the legal frameworks in these states now reject a central feature of *Batson* and our "colorblind" equal protection jurisprudence more generally.[38]

The Article then zooms in, providing a detailed examination of how Arizona's historic decision to give up on peremptory strikes came to pass. Part III offers a case study of judicial rulemaking in action, but it is also a case study of how a longstanding goal of racial justice advocates became law in a relatively improbable jurisdiction. Why did Arizona—with its

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33. See Benjamin Kaplan & Warren J. Greene, The Legislature's Relation to Judicial Rule-Making: An Appraisal of *Winberry v. Salisbury*, 65 Harv. L. Rev. 234, 239–40 (1951); Roscoe Pound, Procedure Under Rules of Court in New Jersey, 66 Harv. L. Rev. 28, 28 (1952) (responding to Kaplan & Greene, supra); see also A. Leo Levin & Anthony G. Amsterdam, Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision, 107 U. Pa. L. Rev. 1, 24–29 (1958) (discussing Winberry v. Salisbury, 74 A.2d 406 (N.J. 1950)).

34. See infra section IV.C.

35. See infra section IV.C.

36. See infra sections II.A–.B.

37. See infra section II.B.

38. But see Devon W. Carbado, Strict Scrutiny & the Black Body, 69 UCLA L. Rev. 2, 39–40 (2022) ("This atomizing, colorblind approach to race . . . is not race neutral but deeply racially invested in ignoring or explicitly dismissing contemporary manifestations of racial injustice . . . .").

staunchly conservative judiciary[39]—become the first to abolish peremptory strikes, a proposal most closely associated with Justice Thurgood Marshall?[40] As the Part explores, shortly after the tumultuous summer of 2020, when racial justice demonstrations prompted the governor to impose a statewide emergency curfew order, the Arizona Supreme Court had before it two dueling rule-change proposals related to jury selection. The first was a reform proposal, modeled after Washington and California's measures; the second urged scrapping peremptory strikes altogether.[41] But over several months of debate, certain criticisms of the Washington-style reform proposal gained traction: With its aim of adapting *Batson* to account for "implicit, institutional, and unconscious biases"[42]—and its instruction to trial judges to determine whether "any reasonable person could view . . . race . . . as a[n] . . . unconscious factor" influencing a peremptory strike[43]—many judges came to see the Washington-style reform as "too woke."[44] Elimination of peremptories, which promised more efficient trials and no such awkward inquiries into attorneys' biases, eventually became the more attractive option.

Finally, in Part IV, the Article surveys the current lay of the land when it comes to state supreme courts' rulemaking authority. While a comprehensive comparative analysis could fill a treatise, the Part focuses on peremptory strikes (and the possibility of other states following in the footsteps of Washington or Arizona) to explore where further reforms might be possible, and where they would stall. As the Part demonstrates, most state supreme courts currently have the power to substantially revamp how jury selection occurs, with several doing so not because their state constitutions require it but because such procedural reform would have a salutary effect on the administration of justice.[45] Somewhat fewer

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39. See Hank Stephenson, Where Court Packing Is Already Happening, Politico Mag. (Oct. 12, 2020), https://www.politico.com/news/magazine/2020/10/12/where-court-packing-is-already-happening-428601 [https://perma.cc/A48D-E4FM] ("A body that had four conservatives and one liberal when [Arizona Governor Doug] Ducey took office now consisted of seven conservatives and zero liberals.").

40. Concurring in *Batson v. Kentucky*, Justice Marshall predicted that the decision would "not end the racial discrimination that peremptories inject into the jury-selection process." 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring). That goal, he argued, would only be "accomplished . . . by eliminating peremptory challenges entirely." Id. at 103.

41. See infra section III.B.

42. Jodi Knobel Feuerhelm & Lawrence S. Matthew, *Batson* Working Grp., Petition app. A at 1, In re Petition to Amend the Rules of the Sup. Ct. of Ariz. to Adopt Rule 24—Jury Selection, No. R-21-0008 (Ariz. filed Jan. 8, 2021), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=9310 [https://perma.cc/L7KE-4SD3] [hereinafter BWG Proposal].

43. Id. app. A at 2.

44. See infra section III.C (discussing the interviews with Arizona state judges during which this sentiment was revealed).

45. See infra Part IV.

state supreme courts have the power to abolish peremptory strikes altogether, but Arizona is by no means exceptional: We assess that more than half of the country's state supreme courts probably have such power.[46] The judiciary's power to promulgate such rules in the first instance does not imply full supremacy over the legislature, however, so Part IV concludes by exploring how rule-based reforms might fare in the face of legislative pushback. A brief Conclusion considers the implications of the foregoing for criminal procedure reform moving forward, particularly in a moment when racial justice movements have centered ways in which "our criminal legal system itself . . . yields forms of domination and violence."[47]

While the judicial rulemaking authority of state supreme courts has been (we argue) underappreciated and understudied, this Article fits within several bourgeoning literatures. First, we join a growing group of scholars who contend that state courts warrant greater attention than they typically receive.[48] A focus on issues affecting state courts is both important in its own right and can usefully inform our thinking about analogous issues at the federal level.[49] Second, and relatedly, the Article's focus on the intricacies of state-level rulemaking in particular is part of a shift away from larger constitutional-doctrinal or normative questions in criminal law scholarship and toward a focus on the criminal law's real-world operation.[50] State courts are, of course, "where the overwhelming bulk of

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46. See infra Table 1.

47. Jocelyn Simonson, Police Reform Through a Power Lens, 130 Yale L.J. 778, 787 (2021).

48. See, e.g., Marin K. Levy, Packing and Unpacking State Courts, 61 Wm. & Mary L. Rev. 1121, 1132 (2020) ("[S]tate courts tend to be understudied in the academic literature . . . [perhaps because] they are challenging subjects of study."); Michael C. Pollack, Courts Beyond Judging, 46 BYU L. Rev. 719, 725 (2021) ("[S]cholars have largely overlooked the need for a systematic understanding of *state court* judges beyond traditional judging . . . ."); Miriam Seifter, State Institutions and Democratic Opportunity, 72 Duke L.J. 275, 284 (2022) (urging greater attention to the important role of state courts in limiting attacks on majoritarian institutions); Adam B. Sopko, Catalyzing Judicial Federalism, 109 Va. L. Rev. Online 144, 158 (2023), https://virginialawreview.org/wp-content/uploads/2023/07/Sopko_Book.pdf [https://perma.cc/2BYY-ET3X] (arguing that, "[w]ith their policymaking powers, [state] courts can influence the ways the state's justice system functions" to better safeguard rights); see also Jeffrey S. Sutton, 51 Imperfect Solutions 6 (2018) ("[A]n underappreciation of state constitutional law has hurt state *and* federal law and has undermined the appropriate balance between state *and* federal courts in protecting individual liberty."); Goodwin Liu, State Courts and Constitutional Structure, 128 Yale L.J. 1304, 1310 (2019) (reviewing Sutton, supra).

49. See, e.g., William Baude, Is Originalism Our Law?, 115 Colum. L. Rev. 2349, 2399–400 (2015) (exploring the diversity of state court approaches to originalism when interpreting state constitutions); Joseph Blocher, Reverse Incorporation of State Constitutional Law, 84 S. Cal. L. Rev. 323, 385 (2011) (urging greater use of state constitutional doctrine to resolve problems arising under the federal Constitution).

50. Stephanos Bibas, The Real-World Shift in Criminal Procedure, 93 J. Crim. L. & Criminology 789, 791–92 (2003) (book review) (noting that "the real-world approach" to criminal law scholarship "is coming into its own"); Benjamin Levin, Rethinking the Boundaries of "Criminal Justice", 15 Ohio St. J. Crim. L. 619, 623 (2018) (book review)

criminal prosecutions actually take place."[51] And in this domain, beyond the dominance of the "two familiar legal pillars of the American criminal justice system—substantive and constitutional criminal law— . . . lies a third, unseen but essential body of law."[52] This Article explores in more granular detail how a core feature of this subconstitutional law—state judicial rulemaking—operates when it comes to race, the jury, and criminal procedure today (and perhaps tomorrow).

I. JUDICIAL RULEMAKING AND AMERICAN CRIMINAL PROCEDURE

Writing in 1928, Dean John Wigmore insisted that it was "high time" to confront a legal problem that had "long remained in abeyance."[53] Both Congress and state legislatures, Wigmore insisted, "exceed[] [their] constitutional power when [they] attempt[] to impose upon the judiciary any rules for the dispatch of the judiciary's duties; and . . . therefore all legislatively declared rules for procedure, civil or criminal, in the courts, are void, except such as are expressly stated in the Constitution."[54] Dean Roscoe Pound's views were not quite so radical,[55] but he too firmly believed rulemaking ought to be within the purview of the judiciary: "In truth procedure of courts is something that belongs to the courts rather than to the legislature, whether we look at the subject analytically or historically. It is a misfortune that the courts ever gave it up."[56] Regulation of procedure by

("[A] range of scholars increasingly has shifted away from the normative question of justified criminalization . . . or even the descriptive question of statutory criminalization . . . to ask a bigger descriptive question—where is criminal law operating surreptitiously or what is the importance of under-examined aspects of the system?"); see also Crespo, supra note 23, at 1305–06 (describing the "blind spots" in criminal law scholarship due to the traditional focus on substantive and constitutional law).

51. Daniel Epps, Checks and Balances in the Criminal Law, 74 Vand. L. Rev. 1, 19 (2021); see also Nancy J. King & Michael Heise, Misdemeanor Appeals, 99 B.U. L. Rev. 1933, 1939–40 (2019) (estimating that there were "approximately 5.8 million misdemeanor convictions entered by state courts nationwide in 2016"); Megan Stevenson & Sandra Mayson, The Scale of Misdemeanor Justice, 98 B.U. L. Rev. 731, 737 (2018) (estimating that 13.2 million misdemeanor cases are filed in the United States each year).

52. Crespo, supra note 23, at 1305.

53. John H. Wigmore, Editorial Notes—All Legislative Rules for Judiciary Procedure Are Void Constitutionally, 23 Ill. L. Rev. 276, 276 (1928).

54. Id. (emphasis omitted).

55. See Roscoe Pound, The Rule-Making Power of the Courts, 12 A.B.A. J. 599, 601 (1926) [hereinafter Pound, The Rule-Making Power] ("It may be that today, after seventy-five years of codes and practice acts and prolific procedural legislation, we can't go so far as to pronounce such legislative interference with the operations of a coordinate department to be unconstitutional.").

56. Id.; see also Roscoe Pound, Regulation of Judicial Procedure by Rules of the Court, 10 Ill. L. Rev. 163, 163 (1916) [hereinafter Pound, Regulation of Judicial Procedure] (advocating for "leaving the regulation of procedure wholly to rules of court, to be framed by the judges").

court rule was not just a worthy "innovation," reformers insisted, "but a return to fundamental principles."[57]

If the method by which the law of jury selection is now being rewritten seems odd, dubious, or even illegitimate, the debates that gripped the legal profession a century ago provide helpful context. What's happening now, in other words, is nothing new, though the history has largely been forgotten. Judicial rulemaking "dominated the scene for most of the first century of the American judiciary,"[58] an inheritance of "common-law courts and the court of chancery in England[,] [which] had regularly exercised this power down to the Revolution."[59] The judiciary's "power to control procedure was hardly questioned."[60] But by the middle of the nineteenth century, reaction against "cumbrous, dilatory, expensive, ultra-formal procedure" sparked calls for modernization and reform.[61] Courts "appeared unable or unwilling to initiate the procedural reforms necessary to satisfy changing social and economic needs," while the creation of new states (with new court systems) "required the immediate adoption of comprehensive rules of procedure."[62] Into the void stepped state legislatures, most notably that of New York, whose Field Code (governing civil procedure) spurred similar codification efforts in jurisdictions across the country.[63] Over the next seventy-five years, "codes and practice acts and prolific procedural legislation" became so commonplace, for both civil and criminal procedure, that it was hard to imagine a time when it was otherwise.[64]

But Pound, Wigmore, and other reformers bristled at the "strait-jacket of statutory procedure" that legislatures had "impose[d]" upon American courts.[65] The judiciary knew best how to run the courts; it was "as nearly disinterested as any conceivable body could be"—unlike the legislature, which was "the catspaw of a few intriguing lawyers."[66] And the judiciary could amend its rules more efficiently as the need arose, unlike the "slow-moving machinery" of the legislature.[67] "When rules of procedure are

57. Minimum Standards of Judicial Administration app. A at 514 (Arthur T. Vanderbilt ed., 1949) [hereinafter Minimum Standards] (reproducing reports adopted by the ABA's Section of Judicial Administration and approved by the ABA's general governing body).

58. Carrie Leonetti, Watching the Hen House: Judicial Rulemaking and Judicial Review, 91 Neb. L. Rev. 72, 80 (2013).

59. Pound, Regulation of Judicial Procedure, supra note 56, at 170–71.

60. Paul E. Wilson, Implementation by Court Rule of the Criminal Justice Standards, 12 Am. Crim. L. Rev. 323, 324 (1974).

61. Pound, The Rule-Making Power, supra note 55, at 599.

62. Wilson, supra note 60, at 324.

63. See id.; see also Kellen Richard Funk, The Lawyer's Code: The Transformation of American Legal Practice, 1828–1938, at 5–6 (2018).

64. Pound, The Rule-Making Power, supra note 55, at 601.

65. Id.

66. Wigmore, supra note 53, at 278.

67. Id.

made by judges," Pound argued, "they will grow out of experience, not out of the ax-grinding desires of particular law-makers."[68] "The leaders of the American bar," Professor Charles Alan Wright later wrote, were "firmly of the opinion that the courts should possess the rule-making power and that neither Congress nor the state legislatures should continue the haphazard, wasteful and unscientific method of regulating the minutiae of judicial procedure by statute."[69]

Congress's passage of the Rules Enabling Act (REA) in 1934,[70] which authorized the Supreme Court to promulgate rules of practice and procedure in civil actions, was a crowning achievement of this movement.[71] In short order, the Court would use its new authority to produce the much-lauded Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure,[72] and (decades later) the Federal Rules of Evidence. This history is well known and carefully studied, but parallel developments in the states have received less attention. In many jurisdictions, the spirit of reform caught on long before Congress acted, with several states experimenting with rulemaking regimes prior to the REA.[73] In 1938, under the leadership of Arthur T. Vanderbilt and buoyed by the REA, the ABA pressed other states to follow suit, urging that "practice and procedure in the [state] courts should be regulated by rules of court; and that to this end the courts should be given full rule-making power."[74] Over the next few decades, judicial rulemaking became central to the development of both civil and criminal procedure in American state courts.[75]

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68. Judicial Versus Legislative Determination of Rules of Practice and Procedure—A Symposium, 6 Or. L. Rev. 36, 44 (1926); see also Levin & Amsterdam, supra note 33, at 10–11 (summarizing arguments in favor of judicial control over rules of procedure).

69. Charles Alan Wright, Procedural Reform in the States, 24 F.R.D. 85, 86 (1959).

70. Rules Enabling Act, ch. 651, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2018)).

71. See Charles E. Clark, The Influence of Federal Procedural Reform, 13 Law & Contemp. Probs. 144, 144–45 (1948) ("This achievement, therefore, is an event in American judicial history.").

72. Id.

73. Silas A. Harris, The Rule-Making Power, 2 F.R.D. 67, 68–70 (1943) (discussing the shift from legislative to judicial rulemaking in Colorado, Delaware, Maryland, New Jersey, Ohio, Washington, and Wisconsin from 1912 to 1930); see also Wilson, supra note 60, at 326 (discussing "growing disenchantment in many of the states with the results of attempting to regulate court procedures through the enactment of legislative codes" throughout the 1910s). For a thorough bibliography of writing on the topic by 1930, see generally The Rule-Making Power: A Bibliography, 16 A.B.A. J. 199 (1930).

74. Minimum Standards, supra note 57, app. A at 506.

75. Wright, supra note 69, at 86–87 (noting that "rules substantially similar to the federal rules . . . are now in effect in 17 jurisdictions"); see also Minimum Standards, supra note 57, at 97–127 (describing the development of state courts' rulemaking power).

Legal scholarship on judicial rulemaking generally focuses on post-1934 federal rulemaking under the REA,[76] but federal judicial rulemaking and its state-level analogues have followed very different trajectories. Under the REA, for instance, Congress granted to the U.S. Supreme Court rulemaking power,[77] but this limited delegation has never been viewed as abrogating Congress's power to subsequently alter court-promulgated procedural rules.[78] To those who believed that the judiciary enjoys absolute power over its own procedure—either as an inherent feature of being a court or as a logical corollary to separation-of-powers principles—the notion that rulemaking authority is a legislature's to "give" in the first place seemed strange. And indeed, many states (even those in which the state legislature passed "enabling acts" akin to the REA) have long assumed that the power over procedure has always been allocated primarily, if not exclusively, to the judiciary.[79] In 1931, the Supreme Court of

76. See, e.g., Stephen B. Burbank & Sean Farhang, Federal Court Rulemaking and Litigation Reform: An Institutional Approach, 15 Nev. L.J. 1559, 1561 (2015) (exploring the influence of ideology on the Justices' interpretations of the Federal Rules); Richard D. Freer, The Continuing Gloom About Federal Judicial Rulemaking, 107 Nw. U. L. Rev. 447, 449 (2013) (discussing the reasons for the lack of innovation and leadership in federal rulemaking in recent decades); Jordan M. Singer, The Federal Courts' Rulemaking Buffer, 60 Wm. & Mary L. Rev. 2239, 2242 (2019) (exploring federal procedural rulemaking through the lens of "buffering"); Charles M. Yablon, Inherent Judicial Authority: A Study in Creative Ambiguity, 43 Cardozo L. Rev. 1035, 1038 n.13 (2022) ("[T]his Article will deal almost exclusively with the inherent judicial authority of the federal courts."). For more historically based recent scholarship on federal rulemaking, see Thomas Ward Frampton, Why Do Rule 48(a) Dismissals Require "Leave of Court"?, 73 Stan. L. Rev. Online 28, 32–33, 35–37 (2020), https://www.stanfordlawreview.org/online/why-do-rule-48a-dismissals-require-leave-of-court [https://perma.cc/HV8B-UBSS] [hereinafter Frampton, Rule 48(a) Dismissals] (arguing that the primary purpose of Rule 48(a) was to prevent politically influenced dismissals of criminal cases by prosecutors); Ion Meyn, Constructing Separate and Unequal Courtrooms, 63 Ariz. L. Rev. 1, 4 (2021) (arguing that the Federal Rules of Criminal Procedure "operated in concert with existing structural inequalities" in 1940s America to "reinforc[e] the racial ordering of the period within the criminal law arena"); Ion Meyn, Why Civil and Criminal Procedure Are So Different: A Forgotten History, 86 Fordham L. Rev. 697, 707–12 (2017) (exploring the initial draft of the Federal Rules of Criminal Procedure and how it mirrored the Federal Rules of Civil Procedure).

77. See 28 U.S.C. § 2072 (2018).

78. See Hanna v. Plumer, 380 U.S. 460, 472 (1965) (acknowledging the "congressional power to make rules governing the practice and pleading" in federal courts); cf. Ellen A. Peters, Getting Away From the Federal Paradigm: Separation of Powers in State Courts, 81 Minn. L. Rev. 1543, 1554 (1997) ("[O]ne of the flash points of conflict for state courts has been the question of who determines the rules of judicial procedure. This is not an open question in the federal system, in which that authority unambiguously belongs to Congress, although it has been delegated to the Supreme Court." (footnote omitted)).

79. See, e.g., State v. Roy, 60 P.2d 646, 660 (N.M. 1936) (arguing that the state's REA is "not a delegation of power," since the judiciary already had the power to make procedural rules). For discussions of state separation-of-powers jurisprudence, see generally Michael C. Dorf, The Relevance of Federal Norms for State Separation of Powers, 4 Roger Williams U. L. Rev. 51 (1998) (discussing diverse state-level approaches to separation-of-powers problems); Epps, supra note 51, at 19 ("[T]here is reason to think that the story of the separation of powers in state criminal justice systems diverges from the federal account.").

Colorado, citing Dean Pound, issued a strident defense of "the *constitutional* power of the courts to make its [sic] own rules for its own procedure."[80] In 1936, upholding a murder conviction—and its court rules promulgated under a recent enabling statute—the New Mexico Supreme Court was similarly forceful:

> Whether the legislative branch of the government was ever rightfully in the rule-making field, or was a mere trespasser or usurper, need not now be determined. [The enabling statute] is not a delegation of power. It is a mere abdication or withdrawal from the rule-making field . . . . The Legislature, in effect, [has] said to the court: "You make the rules hereafter."[81]

In contrast, the Florida Supreme Court in 1941 declined the invitation of the Florida State Bar Association to promulgate a set of civil rules under its own inherent authority: "[W]e owe it to society to hike the administration of justice off the ass," the court explained in a colorful (and very extended) metaphor, but "it takes more than public urgence to clothe the court with power where none existed before."[82]

One of the most forceful assertions of judicial rulemaking power came from the Supreme Court of New Jersey in 1950. At issue in *Winberry*

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80. Kolkman v. People, 300 P. 575, 585 (Colo. 1931) (emphasis added). Professor Charles McCormick called the majority opinion, which signaled that the court would declare unconstitutional any legislative attempt to override its rules, "significant as a spark thrown off in the clash of forces now contending for dominance in the administration of justice." Charles T. McCormick, Legislature and Supreme Court Clash on Rule-Making Power in Colorado, 27 Ill. L. Rev. 664, 664 (1932); see also *Kolkman*, 300 P. at 590 (Butler, J., dissenting) ("[The majority] gives this warning to the Legislature: Hands off! There must be no more . . . legislative acts concerning procedure in either civil or criminal cases. Such interference will not be tolerated by this court.").

81. *Roy*, 60 P.2d at 660 (identifying "inherent power" as the authority for the rule).

82. As the court evocatively explained:

> It is inconceivable that litigants of the present who transact business by the press of a button, the aid of a dictaphone, or the switch of a gadget, who ride in high-powered cars, traverse the continent overnight by airplane, hop to Europe by Clipper, and spend the weekend in Miami out of New York, would be content like Balaam, to travel the highway to justice on the back of an ass, and if ultimately secured, record it at the point of a goose quill in the light of a tallow dip. I think we owe it to society to hike the administration of justice off the ass, but for the reasons stated, [w]e refuse to twit those who are reluctant to abandon him for the means proposed. This stupid old quadruped is the moron of the equine genus but he is the symbol of our democracy, hence it is not strange that as lawyers, we have acquired an affinity for him akin to reverence. We officiated at the manger of the thing he symbolizes and by and large have been its most consistent defenders. If ever it vanishes from earth we will be there to chant a requiem at its tomb.

In re Fla. State Bar Ass'n for Promulgation of New Fla. Rules of Civ. Proc., 199 So. 57, 60 (Fla. 1940). In 1956, the Florida Constitution was amended to vest rulemaking power in the Florida Supreme Court. See Fla. Const. art. V, § 3 (1956) ("The practice and procedure in all courts shall be governed by rules adopted by the supreme court.").

v. Salisbury was a provision of New Jersey's newly adopted constitution, which read: "The Supreme Court shall make rules governing the administration of all courts in the State and, *subject to law*, the practice and procedure in all such courts."[83] During drafting, former ABA President Vanderbilt (unsuccessfully) urged that the words "subject to law" be eliminated, as the language seemed to impose legislative supremacy over judicial rulemaking.[84] If the New Jersey Legislature repealed a court-promulgated rule by statute, the "subject to law" language certainly would seem to give the legislature overriding power. But three years later, as the new Chief Justice of the New Jersey Supreme Court, Vanderbilt took a different view.[85] The "ambiguous [and] elliptical" phrase "subject to law," Vanderbilt explained, did not mean "subject to legislation," but rather subject to "substantive law as distinguished from pleading and practice."[86] The language actually reinforced the judiciary's authority over the procedural domain and, within that domain, supported the "conclu[sion] that the rule-making power of the Supreme Court is not subject to overriding legislation."[87]

Another key area where federal and state judicial rulemaking have diverged concerns the boundaries between "procedural" and "substantive" rules. Under the REA, the U.S. Supreme Court "shall have the power" to promulgate "general rules of practice and procedure"; such rules, Congress provided in the Act's next sentence, "shall not abridge, enlarge or modify any substantive right."[88] Over the past ninety years, however, the precise line between "procedural" and "substantive" federal rules has remained unclear.[89] State judicial rulemaking likewise is generally confined to "procedure," but many state supreme courts have developed their

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83. 74 A.2d 406, 408 (N.J. 1950) (emphasis added) (internal quotation marks omitted) (quoting N.J. Const. art. VI, § 2, para. 3 (1947)).

84. See Letter from Arthur T. Vanderbilt, Esq., to the Comm. on the Judiciary Const. Convention (July 29, 1947), *in* 4 State of New Jersey Constitutional Convention of 1947, at 729, 729 (Sidney Goldmann & Herman Crystal eds., 1947).

85. Vanderbilt's evolving interpretations are wryly noted in Levin & Amsterdam, supra note 33, at 25–26.

86. *Winberry*, 74 A.2d at 408–10.

87. Id. at 414.

88. 28 U.S.C. § 2072 (2018).

89. See Leslie M. Kelleher, Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously, 74 Notre Dame L. Rev. 47, 49 (1998) ("[N]either the Court nor the commentators have managed to produce a workable definition of the 'substantive rights' limitation."). The language of the Act might plausibly be construed as imposing two independent constraints on rulemaking authority (that is, a rule could be "procedural" while impermissibly abridging substantive rights), but the Court has effectively collapsed the inquiries into one: "[B]y [the Court's] lights, either a Rule [is] procedural *or* it affect[s] substantive rights." John Hart Ely, The Irrepressible Myth of *Erie*, 87 Harv. L. Rev. 693, 719 (1974). Importantly, though, no federal rule has ever been invalidated as exceeding the "procedural" authority conferred under the REA, leading some to argue that "the Court's failure to provide a rigorous articulation of the contours of the REA . . . [has] enabled some

own approach(es) to ascertaining the outer limits of their "procedural" authority. In a notable 1974 case, for instance, the Connecticut Supreme Court invalidated a statute governing criminal discovery but struggled at length to develop a definition of "procedural" within the meaning of the Connecticut Constitution (before, essentially, giving up on the enterprise).[90] Two years later, the Supreme Court of New Mexico similarly acknowledged that "the line between substance and procedure is often elusive and that authorities, in endeavoring to follow this dichotomy in the rule-making process, are not always in accord."[91] In one jurisdiction, then, a court rule might be considered impermissibly "substantive," while in another the same rule might permissibly regulate practice and "procedure."

In recent decades, scholarly interest in judicial rulemaking—particularly at the state level—seems to have waned.[92] "[S]cholars have tended to gravitate toward 'where the action is,'"[93] and for the last several decades, the most notable action has been the Supreme Court's constitutionalization of criminal procedure (including, of course, the law of jury selection).[94] Criminal law and criminal procedure scholars have become

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rules to escape being detected as ultra vires judicial regulation." A. Benjamin Spencer, Substance, Procedure, and the Rules Enabling Act, 66 UCLA L. Rev. 654, 658–59 (2019); see also Mistretta v. United States, 488 U.S. 361, 392 (1989) (explaining that the Court has upheld various rules notwithstanding that "all rulemaking is nonjudicial in the sense that rules impose standards of general application" and that such rulemaking "has been substantive and political in the sense that the rules of procedure have important effects on . . . substantive rights"); Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941) ("The test must be whether a rule really regulates procedure[]—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.").

90. See State v. Clemente, 353 A.2d 723, 727–32 (Conn. 1974). *Clemente*, it appears, was subsequently overruled, or at least substantially undermined, by cases suggesting that "judicial and legislative authority may properly coexist" in certain areas under the Connecticut Constitution. Peters, supra note 78, at 1554 n.50.

91. Ammerman v. Hubbard Broad., Inc., 551 P.2d 1354, 1357 (N.M. 1976); see also J.T. v. O'Rourke ex rel. Tenth Jud. Dist., 651 P.2d 407, 410 n.2 (Colo. 1982) ("The line that separates a substantive rule from a procedural rule is amorphous; no legal test has been uniformly adopted.").

92. Currently, it is difficult to imagine a state supreme court decision on rulemaking authority would create much of a stir in the legal profession. But the *Winberry* decision, discussed earlier, garnered significant attention at the time. See supra note 33.

93. G. Alan Tarr, Understanding State Constitutions 2 (2000).

94. See Andrew D. Leipold, Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation, 86 Geo. L.J. 945, 946–47 (1998) ("The Supreme Court has had more to say about who sits on criminal juries in the last twenty years than it did in the previous 180."); William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 Yale L.J. 1, 18 (1997) (describing the increasing procedural regulation of grand jury and petit jury selection). But see Thomas Ward Frampton, For Cause: Rethinking Racial Exclusion and the American Jury, 118 Mich. L. Rev. 785, 791 (2020) [hereinafter Frampton, For Cause] (arguing that the Court's assertive "constitutionalization" of the jury selection process largely exempted challenges for cause).

accustomed to (1) ignoring state courts generally[95] and (2) overlooking subtler ways in which the subconstitutional law of criminal procedure (both statutes and court-promulgated rules) continues to shape the criminal process as experienced by most defendants.[96] But, beneath the surface, judicial rulemaking continues to play a powerful role in shaping American criminal procedure. The past century of rulemaking has left a patchwork system in which, for criminal defendants in many states, judicial rulemaking is the primary mode through which criminal procedure is regulated and in which the power of many state supreme courts is far greater than those accustomed to the federal paradigm likely realize.

II. *BATSON* AND THE TURN TO THE STATES

Nowhere is the ongoing importance of judicial rulemaking more apparent, at least in recent years, than in the law of jury selection. Thirty-five years ago, in *Batson v. Kentucky*, the U.S. Supreme Court announced that the Equal Protection Clause of the Fourteenth Amendment required trial courts to apply a three-step framework for assessing the validity of peremptory strikes.[97] Since then, a broad scholarly consensus has developed that the landmark opinion failed to end (or even meaningfully limit) discrimination in jury selection.[98] Whatever promise *Batson* initially held—and some scholars have questioned whether it held any[99]—the Court has since "render[ed] its own decision as meaningless, ineffective, and unthreatening as possible."[100] The criticism is not limited to academia: In 2006, Justice Stephen Breyer came out in favor of "reconsider[ing] *Batson*'s test and the peremptory challenge system as a whole,"[101] and other prominent judges have argued recently that "[t]he only way to eliminate discrimination in the use of peremptory strikes is to eliminate peremptories."[102] Every few years, the U.S. Supreme Court grants relief in a *Batson*

95. See supra notes 48–49 and accompanying text.

96. See supra notes 50–52 and accompanying text.

97. 476 U.S. 79, 96–98 (1986) (establishing the framework); see also Purkett v. Elem, 514 U.S. 765, 767–68 (1995) (applying the framework).

98. See Frampton, For Cause, supra note 94, at 786–88 (collecting representative scholarship).

99. See, e.g., Paul Butler, Mississippi Goddamn: *Flowers v. Mississippi*'s Cheap Racial Justice, 2019 Sup. Ct. Rev. 73, 106 ("*Batson* . . . encourage[s] ignorance, or at least the performance of an obstinate, counterfactual color-blindness by people who likely know better.").

100. Leonard L. Cavise, The *Batson* Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection, 1999 Wis. L. Rev. 501, 501.

101. Rice v. Collins, 546 U.S. 333, 344 (2006) (Breyer, J., concurring).

102. Gregg Costa, A Judge Comments, Litigation, Summer 2022, at 36, 36; see also State v. Veal, 930 N.W.2d 319, 340 (Iowa 2019) (Wiggins, J., concurring in part and dissenting in part) ("The only way to stop the misuse of peremptory challenges is to abolish them in Iowa and require judges to enforce rigorously challenges for cause."); Spencer v. State, 149 A.3d 610, 648 (Md. 2016) (McDonald, J., dissenting) ("[T]he *Batson* analysis is

case—solemnly proclaiming the Court's unwillingness to allow racism to pollute the jury—but these opinions have been so fact-bound as to render them practically irrelevant beyond their immediate (exceptional) circumstances.[103]

But the Supreme Court's hands-off approach when it comes to race and the jury does not mean that change is not underway. Momentum has been building quietly at the state level for changes to jury selection practices. While scholars have noted and discussed reform efforts in particular jurisdictions,[104] this Part is the first to consider the movement as a whole, assessing its growth and broader significance.[105]

A. *Rhetoric and Reality*

The U.S. Supreme Court regularly affirms the importance of eliminating racial bias in jury adjudication, underscoring that "[e]qual justice under law requires a criminal trial free of racial discrimination in the jury

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not intuitive and appellate review is difficult and deferential. . . . A better solution, in my view, would be to eliminate peremptory challenges altogether . . . ."); Ray-Simmons v. State, 132 A.3d 275, 290 (Md. 2016) (McDonald, J., dissenting) ("There is no compelling reason to retain peremptory strikes."); State v. Saintcalle, 309 P.3d 326, 350 (Wash. 2013) (González, J., concurring) ("To prevent ongoing violations of the federal and state constitutions, and more generally as a matter of policy, we should abolish peremptory challenges in this state.").

103. See, e.g., Butler, supra note 99, at 81 ("The message that the Kavanaugh and Alito opinions sent to anyone hoping that *Flowers* might signal a more progressive race or criminal jurisprudence from the Roberts Court is, 'Move on. There is nothing to see here.'" (citing Flowers v. Mississippi, 139 S. Ct. 2228 (2019))); Thomas Ward Frampton, What Justice Thomas Gets Right About *Batson*, 72 Stan. L. Rev. Online 1, 3, 5 (2019), https://review.law.stanford.edu/wp-content/uploads/sites/3/2019/09/72-Stan.-L.-Rev.-Online-Frampton.pdf [https://perma.cc/MA9N-2Q45] (discussing the narrowness of *Flowers*); Nancy S. Marder, *Foster v. Chatman*: A Missed Opportunity for *Batson* and the Peremptory Challenge, 49 Conn. L. Rev. 1137, 1143 (2017) ("Petitioner Foster asked the Court to answer a narrow question—whether prosecutors exercised their peremptories in violation of *Batson*—and that is all the Court did.").

104. See, e.g., Anna Offit, Race-Conscious Jury Selection, 82 Ohio St. L.J. 201, 242–47 (2021) (discussing reforms to jury selection in Washington and Massachusetts); Timothy J. Conklin, Note, The End of Purposeful Discrimination: The Shift to an Objective *Batson* Standard, 63 B.C. L. Rev. 1037, 1039–40, 1066–84 (2022) (tracing the efforts of jury selection task forces in Washington, California, and Connecticut); Recent Order, Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, No. R-21-0020 (Ariz. 2021), 135 Harv. L. Rev. 2243, 2243 (2022) (discussing Arizona's abolition of peremptory strikes); Annie Sloan, Note, "What to Do About *Batson*?": Using a Court Rule to Address Implicit Bias in Jury Selection, 108 Calif. L. Rev. 233, 242–54 (2020) (discussing jury selection reform in Washington).

105. At least in law review form. For several years, the Berkeley Law Death Penalty Clinic and Professor Elisabeth Semel have maintained an online, public-facing database of recent reform efforts. See *Batson* Reform: State by State, Berkeley L. Death Penalty Clinic, https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic/projects-and-cases/whitewashing-the-jury-box-how-california-perpetuates-the-discriminatory-exclusion-of-black-and-latinx-jurors/batson-reform-state-by-state [https://perma.cc/WPG9-FENL] (last visited Sept. 27, 2023).

selection process."[106] Per the official account, existing doctrine is doing well: *Batson* "immediately revolutionized the jury selection process that takes place every day in federal and state criminal courtrooms throughout the United States," and since 1986, the Court has "vigorously enforced and reinforced the decision[] and guarded against any backsliding."[107] Justice Anthony Kennedy hit similarly whiggish notes in *Peña-Rodriguez v. Colorado*, emphasizing the "progress" of our nation's "maturing legal system" in promoting "thoughtful, rational dialogue" and "purg[ing] racial bias from the administration of justice."[108]

But, while stressing the importance of this project, the Court has crafted narrow opinions with virtually no applicability beyond the (highly idiosyncratic) facts of the cases at hand. In *Flowers v. Mississippi*, for example, the Court invalidated a Mississippi murder conviction, obtained at the defendant's sixth trial, on *Batson* grounds; Curtis Flowers was exonerated and freed before a seventh trial could take place.[109] In concluding that District Attorney Doug Evans had been motivated by race when he struck one of the Black jurors in Flowers's final trial, the Court emphasized the "extraordinary" facts of Flowers's ordeal: Over the many trials, Evans struck forty-one of the forty-two Black prospective jurors; in the sixth trial, he engaged in "dramatically disparate" questioning and striking of Black and white prospective jurors; and he struck one Black juror for reasons that appeared to apply equally to (unstruck) white jurors.[110] The Court pointedly refused to find any of the evidence, standing alone, sufficient to warrant reversal.[111] Instead, "break[ing] no new legal ground," the Court found that "all of the relevant facts and circumstances taken together" rendered the jury selection process unconstitutional.[112] Similarly, in *Foster*

106. *Flowers*, 139 S. Ct. at 2242; see also Williams v. Louisiana, 136 S. Ct. 2156, 2156 (2016) (granting certiorari and vacating and remanding a murder conviction on *Batson* grounds); Foster v. Chatman, 136 S. Ct. 1737, 1755 (2016) (reversing a capital murder conviction on *Batson* grounds); Snyder v. Louisiana, 552 U.S. 472, 474 (2008) (same); Miller-El v. Dretke, 545 U.S. 231, 237 (2005) (same).

107. *Flowers*, 139 S. Ct. at 2242–43.

108. 137 S. Ct. 855, 868 (2017).

109. Nicholas Bogel-Burroughs, After 6 Murder Trials and Nearly 24 Years, Charges Dropped Against Curtis Flowers, N.Y. Times (Sept. 4, 2020), https://www.nytimes.com/2020/09/04/us/after-6-murder-trials-and-nearly-24-years-charges-dropped-against-curtis-flowers.html (on file with the *Columbia Law Review*) (last updated Sept. 5, 2021); Jesus Jiménez, Curtis Flowers Sues Prosecutor Who Tried Him Six Times, N.Y. Times (Sept. 4, 2021), https://www.nytimes.com/2021/09/04/us/curtis-flowers-doug-evans.html (on file with the *Columbia Law Review*).

110. See *Flowers*, 139 S. Ct. at 2235.

111. Id. ("We need not and do not decide that any one of those four facts alone would require reversal.").

112. Id. Flowers was subsequently exonerated, in significant part due to reporting conducted by the podcast *In the Dark*, which shone a national spotlight on the facts of his case. See Mihir Zaveri, Curtis Flowers's Conviction Tossed by Mississippi Supreme Court, N.Y. Times (Aug. 29, 2019), https://www.nytimes.com/2019/08/29/us/curtis-flowers-doug-

v. Chatman, the Court found purposeful discrimination in the selection of an all-white jury that convicted and sentenced a Georgia man to death.[113] The evidence of racial bias during jury selection was overwhelming: Handwritten notes revealed a "persistent focus on race in the prosecution's file," and the record belied prosecutors' shifting (and sometimes demonstrably false) race-neutral rationales for striking particular Black jurors.[114] But again, the Court's opinion offered little support for defendants unable to produce "smoking gun" evidence as could Timothy Foster: The Court simply explained that "[c]onsidering all of the circumstantial evidence" together with the additional "compelling" evidence, Foster had done enough.[115] Scholars have been near unanimous in their criticism of *Batson* and its progeny.[116]

Though cases involving peremptory strikes have garnered the most attention, the same trend appears across the law of the jury. Over several decades, the Court has largely ignored, and effectively insulated from meaningful constitutional review, the challenge-for-cause process, an underappreciated engine of racial exclusion.[117] To better root out bias (racial or otherwise), some federal courts of appeals have invoked their supervisory power over the district courts in their circuits to promulgate rules guaranteeing meaningful voir dire,[118] but two terms ago in *United*

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evans.html (on file with the *Columbia Law Review*) (recounting the "national conversation" sparked by the podcast); Parker Yesko, It's Over: Charges Against Curtis Flowers Are Dropped, Am. Pub. Media Reps. (Sept. 4, 2020), https://www.apmreports.org/episode/2020/09/04/charges-against-curtis-flowers-are-dropped [https://perma.cc/4K2X-NDX8] (reporting on Flowers's exoneration); see also *Flowers*, 139 S. Ct. at 2254 (Thomas, J., dissenting) (suggesting that "the Court granted certiorari because the case has received a fair amount of media attention").

113. See 136 S. Ct. 1737, 1742–43 (2016).

114. Id. at 1754.

115. Id. at 1754–55; see also Marder, supra note 103, at 1181–82 ("There are few *Batson* challenges that will come as close to having a 'smoking gun' as *Foster* did . . . .").

116. See Frampton, For Cause, supra note 94, at 786–88 & nn.1, 3 (collecting sources).

117. See People v. Suarez, 471 P.3d 509, 567 (Cal. 2020) (Liu, J., concurring) (arguing that "there is significant evidence that removal of jurors for cause is an equally if not more significant contributor to the exclusion of Black jurors" than peremptory strikes); Matthew Clair & Alix S. Winter, The Collateral Consequences of Criminal Legal Association During Jury Selection, 56 Law & Soc'y Rev. 532, 533 (2022) (noting how challenges for cause based on criminal legal association result in "systematic exclusions of marginalized racial/ethnic minorities" from juries); Frampton, For Cause, supra note 94, at 788–89 (discussing the Court's failure to create rules governing for cause challenges); Anna Offit, Benevolent Exclusion, 96 Wash. L. Rev. 613, 625–34 (2021) (arguing that challenges for cause disproportionately exclude people of color from juries).

118. See, e.g., Patriarca v. United States, 402 F.2d 314, 318 (1st Cir. 1968) (suggesting enhanced questioning of prospective jurors that "have been exposed to potentially prejudicial material"); see also Mu'Min v. Virginia, 500 U.S. 415, 446 (1991) (Marshall, J., dissenting) ("Numerous Federal Circuits . . . have adopted . . . procedures for screening juror bias . . . ." (citing United States v. Davis, 583 F.2d 190, 196 (5th Cir. 1978); United States v. Addonizio, 451 F.2d 49, 67 (3d Cir. 1971); Silverthorne v. United States, 400 F.2d 627, 639 (9th Cir. 1968))). The U.S. Supreme Court has done the same. See, e.g., Rosales-

States v. Tsarnaev the Court ruled that the courts of appeals lack such power.[119] The Court's last encounter with the fair cross section doctrine,[120] which purports to guarantee defendants a jury drawn from a representative cross section of the community,[121] came more than a decade ago in *Berghuis v. Smith*; there, the Court sharply curtailed the ability of those convicted in state court to establish they faced an unconstitutionally unrepresentative venire (at least on federal habeas review).[122] And when it comes to racial bias tainting jury deliberations, the Court recently recognized that the common law's "no-impeachment rule"[123] must yield when a defendant presents strong evidence that racial bias infected the jury deliberations process.[124] But the Court carefully circumscribed that holding, limiting it to the "vanishingly rare"[125] situations in which "a juror comes forward with *compelling* evidence that another juror made *clear and explicit* statements indicating that racial animus was a *significant* motivating

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Lopez v. United States, 451 U.S. 182, 191–92 (1981) (plurality opinion) (using the Court's "supervisory power" to declare the subconstitutional rule that the trial court must allow voir dire concerning a juror's potential racial or ethnic prejudice when certain conditions are met). This voir dire is required "when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups." Id.

119. 142 S. Ct. 1024, 1036 (2022). The author of the Court's concurring opinion in *Tsarnaev* wrote extensively on the issue of federal courts' inherent or supervisory powers as a law professor. See, e.g., Amy Coney Barrett, Procedural Common Law, 94 Va. L. Rev. 813, 815 (2008) (offering an account of the federal common law of procedure); Amy Coney Barrett, The Supervisory Power of the Supreme Court, 106 Colum. L. Rev. 324, 325 (2006) (questioning whether the Court possesses "inherent supervisory authority" over the procedure of lower courts).

120. See Taylor v. Louisiana, 419 U.S. 522, 528 (1975) (holding that "the Sixth Amendment right to a jury trial" requires "selection of a [trial] jury from a representative cross section of the community").

121. See Nina W. Chernoff, Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It With Equal Protection, 64 Hastings L.J. 141, 143–44 (2012) (arguing that the development of the fair cross section doctrine has undermined the protections the doctrine could provide to defendants); Paula Hannaford-Agor, Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded, 59 Drake L. Rev. 761, 764 (2011) (noting how the doctrine fails to account for nonsystematic underrepresentation of certain groups on juries).

122. See 559 U.S. 314, 332 (2010) (rejecting the defendant's "laundry list of factors" contributing to the systematic underrepresentation of Black jurors as too speculative). But see Paula Hannaford-Agor & Nicole L. Waters, Safe Harbors From Fair-Cross-Section Challenges? The Practical Limitations of Measuring Representation in the Jury Pool, 8 J. Empirical Legal Stud. 762, 772–73 (2011) (offering qualified praise for the Court's affirmation that various methods of assessing statistical disparities should be considered).

123. See Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 861 (2017) ("A general rule has evolved to give substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations.").

124. Id. at 869.

125. Bridges, supra note 10, at 101.

factor in his or her vote to convict."[126] The Black defendant sentenced to die by a white juror who "wondered if [B]lack people even have souls,"[127] like the Black defendant sentenced to die for the murder of his white wife by three jurors firmly opposed to interracial marriage,[128] has since been turned away.

In short, the gulf between the Court's rhetoric regarding race and the jury, on the one hand, and the doctrine it has crafted over the past thirty-five years, on the other, is jarring. While celebrating the jury as "a central foundation of our justice system and our democracy,"[129] and affirming that "[e]qual justice under law requires a criminal trial free of racial discrimination in the jury selection process,"[130] the Court has shown little appetite for meaningfully confronting the "unique historical, constitutional, and institutional concerns"[131] implicated by racial bias in this area. True, the Court still sometimes responds to forms of racism that "recall[] the racism prevalent during the days of the nation's formal racial caste system," but when it comes to the subtler "processes that sustain racial subordination today," remedies are lacking.[132] Yet despite (or, perhaps, because of) the Court's inaction, change is afoot.

B. *The Move to the States*

Since 2018, jurisdictions representing nearly one-fifth of the American population have adopted reforms to the law of jury selection that depart substantially from the *Batson* framework.[133] These reforms have varied, in terms of both the method by which they have been implemented and their scope. *Batson*, of course, was a constitutional decision: The Court announced, while adjudicating a criminal appeal, that the Fourteenth Amendment's Equal Protection Clause required adherence to a now-familiar three-part framework for evaluating peremptory strikes.[134] But in most of the reforming jurisdictions (Arizona, Connecticut, New Jersey, and Washington), the changes have come about differently: State supreme

126. *Peña-Rodriguez*, 137 S. Ct. at 861 (emphasis added); see also id. at 869 (requiring "overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict" to allow further judicial inquiry); Daniel S. Harawa, The False Promise of *Peña-Rodriguez*, 109 Calif. L. Rev. 2121, 2133 (2021) ("[B]ecause the standard set in *Peña-Rodriguez* is so hard to satisfy, . . . the decision has worked to insulate racial bias from review.").

127. Tharpe v. Ford, 139 S. Ct. 911, 913 (2019) (Sotomayor, J., statement respecting the denial of certiorari).

128. Thomas v. Lumpkin, 143 S. Ct. 4, 4 (2022) (Sotomayor, J., dissenting from the denial of certiorari).

129. *Peña-Rodriguez*, 137 S. Ct. at 861.

130. Flowers v. Mississippi, 139 S. Ct. 2228, 2242 (2019).

131. *Peña-Rodriguez*, 137 S. Ct. at 868.

132. Bridges, supra note 10, at 100, 167.

133. See supra note 7.

134. Batson v. Kentucky, 476 U.S. 79, 96 (1986).

courts have promulgated subconstitutional rules outside the context of any particular case.[135] Only in California did reform come about as the result of new legislation—though the Supreme Court of California, somewhat belatedly, appointed a working group to study jury selection as legislation advanced.[136] And the scope of state-level *Batson* reforms varies as well. Most have preserved a framework that superficially resembles *Batson* while altering one or more stages of the challenge process; Arizona abolished peremptory strikes altogether. This section offers the first comprehensive review of where and how the law of jury selection is changing at the state level. As relevant, we note the ways in which these efforts have built off one another, gaining inspiration and momentum from reforms in other jurisdictions.

1. *Jurisdictions that Have Made Reforms.* — On October 7, 2010, two justices of the Washington Supreme Court "stunned" a group of judges and court staff when they offered their explanation for why African Americans made up four percent of Washington's total population but twenty percent of its prisoners: "[C]ertain minority groups," they explained, "have a crime problem."[137] This crude account—along with other racially charged language from the justices—prompted a group of "concerned community members" to form the Task Force on Race and the Criminal Justice System, cochaired by Professor Robert S. Chang and then-Judge Steven González.[138] As the Task Force later explained, the justices' comments failed to account for the ways in which "facially neutral policies[] and bias" could fuel racial disparities,[139] and dozens of organizations soon joined the effort "to address bias in the justice system at every level."[140]

While the Task Force was meeting, a criminal appeal was working its way to the Washington Supreme Court. Anna Tolson was the sole Black

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135. See infra section II.B.1.

136. See infra section II.B.1. As discussed below, smaller changes to the *Batson* framework have also been made through the ordinary adjudicatory process in Colorado (in an appellate court, as a matter of federal constitutional law) and Massachusetts (in the state supreme court, as a matter of state and federal constitutional law).

137. Steve Miletich, Two State Supreme Court Justices Stun Some Listeners With Race Comments, Seattle Times (Oct. 21, 2010), https://www.seattletimes.com/seattle-news/two-state-supreme-court-justices-stun-some-listeners-with-race-comments [https://perma.cc/3UAR-ZTKY] (last updated Oct. 22, 2010) (explaining that the justices made other racially charged comments, according to reports, including using phrases like "you all" or "you people" (in reference to Black people) and "poverty pimp" (apparently in reference to those emphasizing the role of racial discrimination in the legal system)).

138. See Task Force on Race & Crim. Just. Sys., Preliminary Report on Race and Washington's Criminal Justice System, at i, 7 (2011), https://law.seattleu.edu/media/school-of-law/documents/centers-and-institutes/korematsu-center/initiatives-and-projects/raceand-criminal-justice-task-force/task-force-10-2010–2012/preliminary-report_report_march_1_2011_public_cover.pdf [https://perma.cc/5YY5-ADW8].

139. Id. at 1.

140. Id. at 1, 23; see also Sloan, supra note 104, at 244.

juror in the venire for the trial of Kirk Saintcalle, a Black man ultimately convicted of felony murder (and sentenced to over forty-nine years in prison).[141] Tolson was questioned "far more extensively than any other juror," largely about her opinions about racial prejudice in the legal system.[142] In a remarkably fractured opinion, the court's majority rejected the defendant's *Batson* claim[143]—prosecutors had race-neutral reasons for striking Tolson[144]—but opined at length that *Batson*'s procedures were not "robust enough to effectively combat race discrimination in the selection of juries."[145] Declining to use the case as a vehicle to erect a new framework, the court nevertheless indicated that "it might be more appropriate to consider whether to abolish peremptory challenges through the rulemaking process instead of in the context of a specific case."[146] Justice González, promoted to the Washington Supreme Court in 2011,[147] called for the immediate abolition of peremptory strikes, chastising his colleagues for shirking their duty to "ensure that none of our trial procedures propagate injustice."[148]

Saintcalle launched a multi-year process to craft a court rule responsive to the court's concern that "*Batson* recognizes only 'purposeful discrimination,' whereas racism is often unintentional, institutional, or unconscious."[149] An initial proposal was submitted by the ACLU of Washington in 2015, prompting the Washington Association of Prosecuting Attorneys to file its own competing proposal ("essentially codif[ying] *Batson* and its progeny").[150] Eventually, the Washington Supreme Court convened its own twenty-person workgroup involving key stakeholders "to see if a consensus could be reached."[151] Consensus proved elusive:

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141. See State v. Saintcalle, 309 P.3d 326, 329–30 (Wash. 2013).

142. Id.

143. Id. at 339–41.

144. Prosecutors justified their strike of Tolson on the grounds that she was "inattent[ive]" and that a friend of hers was recently killed (despite conceding earlier in voir dire that her empathy for both sides might make her "representative of the perfect juror"). Id. at 331–32. The court held that the trial court's acceptance of these rationales did not constitute clear error. Id. at 340.

145. Id. at 329.

146. Id. at 338; see also id. at 339 ("A rule change of this magnitude might also be best made through the rulemaking process. . . . [T]his may be the most effective way to reduce discrimination and combat minority underrepresentation in our jury system.").

147. See Steve Miletich, King County Judge Named to State Supreme Court, Seattle Times (Nov. 16, 2011), https://www.seattletimes.com/seattle-news/king-county-judge-named-to-state-supreme-court/ [https://perma.cc/89RT-D5DA].

148. *Saintcalle*, 309 P.3d at 349 (González, J., concurring).

149. See id. at 329 (majority opinion).

150. Sloan, supra note 104, at 248; see also Jury Selection Workgroup, Proposed New GR 37: Final Report 1 (2018), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf [https://perma.cc/NZ42-XZ8E] [hereinafter Washington Workgroup Final Report].

151. Washington Workgroup Final Report, supra note 150, at 1.

Prosecutors reiterated their opposition to key portions of the workgroup's proposal, and one of the group's two cochairs gave up on reform altogether, "conclud[ing] that the only way discrimination can be eliminated from the jury selection process is to eliminate peremptory challenges."[152]

Nevertheless, on April 5, 2018, the Washington Supreme Court promulgated General Rule 37 (G.R. 37), adopting the "most protective version" of the reforms advanced by the ACLU of Washington and their allies on the working group.[153] The new framework departs from *Batson* in two key respects. First, G.R. 37 identifies seven facially race-neutral justifications for a peremptory strike that are now "presumptively invalid" if offered by a proponent at Step Two of the *Batson* framework: (1) having prior contact with law enforcement officers (LEOs); (2) expressing a distrust in LEOs or a belief that they engage in racial profiling; (3) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (4) living in a high-crime neighborhood; (5) having a child outside of marriage; (6) receiving state benefits; and (7) not being a native English speaker.[154] Second, the new rule removes *Batson*'s requirement that challengers prove subjective "purposeful discrimination" at Step Three, replacing it instead with a different inquiry: "If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, the peremptory challenge shall be denied."[155] The "objective observer," the rule instructs, is one who is "aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State."[156] The rule also effectively eliminates Step One of the *Batson* framework (that is, a challenger has no initial burden of production) and establishes other limitations on strikes, including new restrictions on the invocation of "conduct" (e.g., body language, demeanor, inattentiveness) to justify a strike.[157]

152. Id. app. 2 at 1 (statement of Superior Court Judge Blaine Gibson, Workgroup Cochair).

153. See Sloan, supra note 104, at 253.

154. Wash. Ct. Gen. R. 37(h). The rule does not explain how or when a party might overcome this presumption.

155. Wash. Ct. Gen. R. 37(e).

156. Wash. Ct. Gen. R. 37(f).

157. Wash. Ct. Gen. R. 37(c), (i).

Courts outside of Washington quickly took note of G.R. 37, with judges in California,[158] Connecticut,[159] Iowa,[160] Massachusetts,[161] North Carolina,[162] Oregon,[163] and Texas[164] hailing the development. "The State of Washington has shown that other reforms [apart from abolition] are also possible," wrote one California appellate judge in 2019, in an opinion calling for "the Legislature, Supreme Court, and Judicial Council to consider meaningful measures to reduce actual and perceived bias in jury selection."[165] A few months later, the Supreme Court of California announced a workgroup to study possible changes, crediting the Washington reforms as a direct inspiration: "In recent years, some states have adopted or begun to consider additional measures designed to address perceived shortcomings in the practical application of the *Batson* framework . . . . Today we join this dialogue . . . ."[166]

The Supreme Court of California's announcement, however, came as scholars, advocates, and legislators were already preparing a legislative push,[167] and that process was well underway by the time workgroup members were announced.[168] (Activists also had little reason for

158. People v. Bryant, 253 Cal. Rptr. 3d 289, 310 (Ct. App. 2019) (Humes, J., concurring).

159. State v. Holmes, 221 A.3d 407, 434–36 (Conn. 2019) (commending Washington's "comprehensive court rule governing jury selection").

160. State v. Veal, 930 N.W.2d 319, 340 (Iowa 2019) (Wiggins, J., concurring in part and dissenting in part) ("Washington General Rule 37, cited by Justice Appel in his opinion, helps but does not solve the problem.").

161. Commonwealth v. Carter, 172 N.E.3d 367, 388–89 (Mass. 2021) (Lowy, J., concurring).

162. State v. Clegg, 867 S.E.2d 885, 917 (N.C. 2022) (Earls, J., concurring) ("If we are to give more than lip service to the principle of equal justice under the law, we should not . . . pretend that thirty-five years of experience with *Batson* will magically change. There are [various] tools [like rulemaking] at our disposal[;] we urgently need to use them.").

163. State v. Curry, 447 P.3d 7, 14 (Or. Ct. App. 2019) ("Our neighbor, Washington, has been at the forefront of jurisdictions addressing that question, and last year adopted a concrete set of rules for handling *Batson* challenges, which are attached as an appendix.").

164. Tennyson v. State, 662 S.W.3d 401, 408 n.6 (Tex. Crim. App. 2018) (Alcala, J., dissenting from the denial of a petition for discretionary review).

165. People v. Bryant, 253 Cal. Rptr. 3d 289, 310 (Ct. App. 2019) (Humes, J., concurring).

166. Press Release, Cal. Sup. Ct., California Jury Selection Work Group Charge 1 (Jan. 29, 2020), https://newsroom.courts.ca.gov/sites/default/files/newsroom/2020-11/SupCt 20200129.pdf [https://perma.cc/BWN9-8YYT].

167. Supporters of the final measure included a broad range of civil rights organizations, public defenders, community groups, reentry and parole organizations, and other criminal justice reformers. See Off. of Senate Floor Analyses, Bill Analysis of AB 3070, at 9–10 (2020), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB3070 (on file with the *Columbia Law Review*) (listing thirty-one organizations supporting passage).

168. See Jury Selection Work Grp., Final Report to the Supreme Court of California 2 (2022), https://newsroom.courts.ca.gov/sites/default/files/newsroom/2022-09/Jury%20Selection%20Work%20Group%20Final%20Report.pdf [https://perma.cc/ER4N-LVQD] ("Thus, by the time the work group began to meet regularly[,] . . . groundbreaking legislation to modify the existing *Batson/Wheeler* framework had already taken shape and

confidence in a judiciary-led process: In June 2020, a report published by Professor Elisabeth Semel and the Berkeley Law Death Penalty Clinic meticulously documented the California courts' "abysmal" *Batson* record over the past three decades.)[169] In February 2020, the State Assembly introduced a bill (A.B. 3070) modeled after G.R. 37, and, in September 2020, the Governor signed it into law.[170] Like G.R. 37, A.B. 3070 abolished both *Batson*'s first step[171] and the need for proof of subjective "purposeful discrimination"—instead employing an "objectively reasonable" viewer standard.[172] But A.B. 3070 went further than Washington's approach in three main ways.[173] First, in addition to race and ethnicity, it forbade strikes motivated by a prospective juror's "gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups."[174] Second,

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addressed some of the key questions outlined in the court's charge to the work group."); see also Elisabeth Semel, Dagen Downward, Emma Tolman, Anne Weis, Danielle Craig & Chelsea Hanlock, Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors, at viii (2020), https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf [https://perma.cc/7W4Y-J6N7] ("We acknowledge the California Supreme Court's interest in studying [and addressing] *Batson*'s shortcomings . . . . Over the last three decades, the court has declined many opportunities to remedy these inequities. The legislature—through the passage of AB 3070—is better suited to effectively address persistent discrimination in jury selection . . . .").

169. Semel et al., supra note 168, at 23. Numerous dissents authored by Justices Goodwin Liu and Mariano-Florentino Cuéllar—amplified in the *Whitewashing the Jury Box* report—advanced similar critiques. Id. at 54–65.

170. Assemb. B. 3070, 2019–2020 Leg., Reg. Sess. (Cal. 2020). For bill history, see AB-3070 Juries: Peremptory Challenges, Cal. Legis. Info., https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201920200AB3070 [https://perma.cc/AR4F-SW44] (last visited Sept. 26, 2023).

171. See Cal. Civ. Proc. Code § 231.7(b) (2023) ("A party, or the trial court on its own motion, may object to the improper use of a peremptory challenge under subdivision (a).").

172. The amended rule provides:

> If the court determines there is a substantial likelihood that an objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, as a factor in the use of the peremptory challenge, then the objection shall be sustained. The court need not find purposeful discrimination to sustain the objection.

Id. § 231.7(d)(1).

173. There are several additional differences. For example, the California legislation provides a lengthy (but nonexclusive) list of "circumstances" that judges are invited to consider when assessing a strike, id. § 231.7(d)(3)(A)–(G); offers greater detail on the showing necessary to rehabilitate a strike justified by a "presumptively invalid" rationale, id. § 231.7(f); and places additional restrictions on strikes based on demeanor or conduct, id. § 231.7(g)(2) (requiring judicial confirmation of demeanor or conduct and that proponent of strike "explain why the asserted demeanor, behavior, or manner in which the prospective juror answered questions matters to the case to be tried").

174. Id. § 231.7(a).

in lieu of Washington's "objective observer *could view*"[175] standard, the ultimate inquiry under California law is whether "there is a substantial likelihood that an objectively reasonable person *would view*" a protected category as being a "factor" in the use of the strike.[176] While this language might initially appear to impose a more demanding standard than Washington's, "substantial likelihood" is defined as something shy of "more likely than not," meaning the burden of persuasion never shifts from the proponent of the strike.[177] And finally, California added to Washington's list of "presumptively invalid" bases for a strike—adding, for example, "[d]ress, attire, or personal appearance" and "underemployment of the prospective juror or [their] family member."[178] As before, state courts in other jurisdictions quickly took notice, with Colorado,[179] Connecticut,[180] and Montana[181] courts citing California's innovation.

Arizona was the next jurisdiction to reform its jury selection practices. In early 2021, soon after California's A.B. 3070 went into effect, judges and other reformers submitted dueling rule-change petitions to the Arizona Supreme Court to either reform or abolish the use of peremptory strikes. Arizona stakeholders carefully studied the Washington and California changes as part of this process, though ultimately they decided to go in a very different direction. (We explore the remarkable story of how Arizona settled on elimination in the next Part.)

The most recent dominoes to fall are Connecticut and New Jersey; once again, the changes came about through the adoption of new rules by state judiciaries, not through the ordinary adjudicatory process. Within a month of one another during the summer of 2022, both states announced new rules (now in effect) modeled after Washington's G.R. 37.[182] Both abolished Step One of the *Batson* inquiry,[183] both dispensed with the

175. Wash. Ct. Gen. R. 37(e) (emphasis added).

176. Cal. Civ. Proc. Code § 231.7(d)(1) (emphasis added).

177. Id. § 231.7(d)(2)(B).

178. Id. § 231.7(e)(9), (11), (13).

179. People v. Johnson, 523 P.3d 992, 1009 (Colo. App. 2022) (Berger, J., concurring in part and dissenting in part) (accusing the majority of sub silentio importing Washington- and California-style reforms through adjudication).

180. State v. Jose A.B., 270 A.3d 656, 679 n.25 (Conn. 2022).

181. State v. Wellknown, 510 P.3d 84, 99 (Mont. 2022) (Baker, J., concurring).

182. While the New Jersey rule was promulgated by the state's supreme court, Connecticut assigns rulemaking responsibility for the trial courts to the judges of its superior courts. See Conn. Gen. Stat. Ann. § 51-14 (West 2023). Although the proposal for the new rule originated with Chief Justice Richard A. Robinson, it did not become a part of the state's Practice Book until ratified at the Annual Meeting of the Judges of the Superior Court. See Minutes, Rules Comm. Superior Ct. (Dec. 13, 2021), https://www.jud.ct.gov/committees/rules/rules_minutes_121321.pdf [https://perma.cc/92PR-VTNW] (discussing "proposal from Chief Justice Robinson"); Minutes: Annual Meeting, Judges Superior Ct. (June 10, 2022), https://www.jud.ct.gov/committees/judges/JudgeAnnual_minutes_061022.pdf [https://perma.cc/3GZA-3ZF9] (reflecting unanimous approval).

183. Conn. Super. Ct. R. § 5-12(b); N.J. Ct. R. 1:8-3A(b).

requirement of proving a subjective discriminatory purpose,[184] and both declared certain race-neutral rationales "presumptively invalid."[185] While Connecticut's rule (like Washington's) is limited to "race or ethnicity," New Jersey's law applies to strikes based on actual or perceived membership "in a group protected under . . . the New Jersey Law Against Discrimination."[186] This provision makes it the most expansive in terms of the scope of classes protected from peremptory strikes, extending protections (in addition to those categories listed in California's A.B. 3070) to "nationality, or ancestry; . . . disability; marital status or domestic partnership/civil union status; and liability for military service."[187] Connecticut's rule is also notable for having adopted a unique formulation for assessing when a challenged strike is impermissible, asking whether the strike "legitimately raises the appearance" of bias to the objective observer.[188]

In all, nearly seventy million people (almost one-fifth of the country) live in jurisdictions that have significantly changed their jury selection laws in recent years.[189] Notably, none of the foregoing has occurred by way of courts adjudicating cases or interpreting constitutions.[190] And more reform efforts are underway.

2. *Jurisdictions that Are Considering Reforms.* — In other jurisdictions, reform efforts have not yet resulted in changes to the law of jury selection. But in many of the above states, change was years in the making, and the flurry of recent activity (even if unsuccessful) demonstrates the salience of the issue in the states' courts and legislatures.

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184. Conn. Super. Ct. R. § 5-12(d) ("If the court determines that the use of the challenge against the prospective juror, as reasonably viewed by an objective observer, legitimately raises the appearance that the prospective juror's race or ethnicity was a factor in the challenge, then the challenge shall be disallowed . . . ."); N.J. Ct. R. 1:8-3A(d)(2) ("The court shall determine, under the totality of the circumstances, whether a reasonable, fully informed person would find that the challenge violates paragraph (a) of this Rule.").

185. Conn. Super. Ct. R. § 5-12(g); N.J. Ct. R. 1:8-3A, official cmt. 3.

186. Conn. Super. Ct. R. § 5-12(d); N.J. Ct. R. 1:8-3A(a).

187. N.J. Ct. R. 1:8-3A, official cmt. 1. Curiously, although the rule prohibits a party from exercising a peremptory strike on the basis of nationality, New Jersey law provides that only "citizen[s] of the United States" may serve as jurors. See N.J. Stat. Ann. § 2B:20-1 (West 2023).

188. Conn. Super. Ct. R. § 5-12(d).

189. See supra note 7.

190. An appellate court in Colorado has come very close, though. See People v. Johnson, 523 P.3d 992, 997 (Colo. App. 2022) (holding that the prosecutor failed to offer a race-neutral justification for a peremptory strike when the strike was justified based on the juror's disclosure of negative experiences with "cops [who] are disrespectful due to certain racial identities"); see also id. at 1009 (Berger, J., concurring in part and dissenting in part) ("In essence, the majority has adopted, through its adjudicatory authority, precisely what the Colorado Supreme Court has so far rejected."). Massachusetts's highest court has also recently expanded *Batson* to cover sexual orientation under both the Massachusetts Constitution and the Fourteenth Amendment's Equal Protection Clause. See Commonwealth v. Carter, 172 N.E.3d 367, 378–81 (Mass. 2021).

In Colorado—where conflict between the judiciary and the legislature over rulemaking authority has a lengthy history[191]—the debate over *Batson* has surfaced tensions over which branch is more competent to enact politically controversial reforms to jury selection (and how). In response to the racial justice protests during the summer of 2020, a committee appointed by the Colorado Supreme Court began "investigat[ing] and debat[ing] whether to recommend [that the court adopt] a rule in Colorado modeled on Washington State's General Rule 37."[192] Despite strident opposition from the state's prosecutors, a majority of the committee recommended that the court adopt a Washington-style rule.[193] The state supreme court balked, declining to open a public comment period on the proposal and suggesting it might reconsider if "greater consensus" could be reached.[194] A group of Democratic legislators then introduced a bill mirroring the committee's rule proposal, but the state's prosecutors exerted even greater political pressure in front of the Senate Judiciary Committee: All twenty-two of Colorado's elected prosecutors registered their opposition, effectively killing the bill.[195] Defiantly, the legislation's key sponsors challenged the state's high court to revisit the issue through rulemaking, insisting that the rulemaking process was the most viable path to reform.[196] This time, an 8-4 supermajority of the rules committee endorsed the reform proposal (again largely tracking G.R.

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191. See, e.g., McCormick, supra note 80, at 664–68 (discussing the 1931 controversy).

192. Email from John Dailey, J., Colo. Ct. App., to Carlos Samour, J., Colo. Sup. Ct. attach. 2, at 3 (Oct. 4, 2022), https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Committees/Criminal_Rules_Committee/Crim%20P%2024d%20submission%20documents.pdf [https://perma.cc/XQK8-2MMR] (letter from the Colorado Criminal Rules Committee outlining the majority proposal).

193. Kevin McGreevy, Majority Report for the Adoption of Crim. P. 24(d)(5) Addressing the Exercise of Peremptory Challenges During Jury Selection 1 (2021), https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Committees/Criminal_Rules_Committee/Crim%20P%2024%20Majority%20Report.pdf [https://perma.cc/5B5H-7CUL]; see also id. at 13 (describing the state's prosecutors as "the most vehement objectors" to the proposal).

194. Thy Vo, Racial Discrimination Still Exists in Jury Selection. Colorado's Supreme Court Rejected a Proposal Meant to Fix That., Colo. Sun (July 21, 2021), https://coloradosun.com/2021/07/21/racism-jury-selection-colorado-supreme-court/ [https://perma.cc/X2A6-HTV4] (internal quotation marks omitted) (quoting Supreme Court Justice Carlos A. Samour, Jr.'s email to the committee).

195. Letter from Pete Lee, Colo. State Sen., to John Dailey, J., Colo. Ct. App., and Members of the Colo. Crim. Rules Comm. (Mar. 16, 2022), https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Committees/Criminal_Rules/Sen_%20Pete%20Lee%20letter%20re%20Implicit%20Bias_Judge%20Dailey_3_16_2022.pdf [https://perma.cc/2ZP9-PMEB] [hereinafter Lee Letter]. For a nuanced examination of the effects of legislative lobbying by prosecutors, see generally Carissa Byrne Hessick, Ronald F. Wright & Jessica Pishko, The Prosecutor Lobby, 80 Wash. & Lee L. Rev. 143 (2023).

196. See Lee Letter, supra note 195, at 4 ("The communities we represent interpreted the Court's prior refusal to even solicit input from the public . . . as a clear message that its members have no interest in addressing racial bias in our criminal courts in any meaningful way.").

37),[197] and the Colorado Supreme Court opened a period of public comment; the matter remains pending as of fall 2023.[198]

Utah's movement toward reform has more closely resembled those in the states described in the previous section. In September 2021, the Supreme Court of Utah unanimously rejected a *Batson* appeal of a Black defendant who objected to prosecutors' striking of the sole person of color in the jury pool.[199] In so doing, however, the court recognized that *Batson*'s prohibition on "purposeful discrimination" does nothing to limit strikes based "on the concern that potential jurors will be biased against law enforcement witnesses due to past negative experiences with the police," a practice which "may lead to the disproportionate removal of persons of color from juries."[200] The court recognized that the resulting racial disparities in jury composition implicated many of the same concerns animating *Batson* itself:

> [E]ven where a *Batson* violation has not occurred, the disproportionate removal of racial minorities from juries—whether it is due to peremptory strike criterion that disparately impact persons of color, implicit bias, or some other factor—erodes confidence in the justice system and weakens the very notion of a fair trial by an impartial jury. These are important concerns that deserve attention and an earnest search for solutions.[201]

The court formally referred the issue to an advisory committee, with a charge to consider how to craft new rules that would address these concerns,[202] and the body has been regularly meeting on the issue since.[203]

In several states, legislation has been introduced (sometimes at the urging of the state supreme court) to adopt changes akin to those in Washington and California, but thus far, those efforts have sputtered. In New York, for example, a Justice Task Force created by the state's high court recommended in August 2022 a set of reforms to summon a more diverse pool of jurors, including (1) removing the prohibition on jury

197. Colo. R. Crim. P. 24, Proposed Changes (Clean) (2022), https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/Proposed/2022%20Proposed%20Changes/CrimP24marked%20and%20clean.pdf [https://perma.cc/KL7J-UMJS].

198. Michael Karlik, State Supreme Court Opens Comment Period for Jury Bias Proposal, Colo. Pol. (Oct. 20, 2022), https://www.coloradopolitics.com/courts/state-supreme-court-opens-comment-period-for-jury-bias-proposal/article_d523a132-50a8-11ed-8f6a-1bcab85ec324.html [https://perma.cc/VHU2-S5BX] (last updated Jan. 12, 2023).

199. State v. Aziakanou, 498 P.3d 391, 394 (Utah 2021).

200. Id. at 406.

201. Id. at 407.

202. Id. at 407 & n.12.

203. See Committee Meeting Schedule, Sup. Ct.'s Advisory Comm. on the Rules of Crim. Proc., https://legacy.utcourts.gov/utc/crimproc/urcrp-committee-meeting-schedule/ [https://perma.cc/AH7H-UHPU] (last visited Oct. 19, 2023) (noting that "[m]eetings are held every other month").

service by those convicted of a felony and increasing juror pay; and (2) reforming the *Batson* framework for peremptory strikes.[204] But New York's highest court is one of the few that lacks robust rulemaking powers,[205] and so far bills to rewrite the statute governing peremptory strikes have stalled in committee.[206] Likewise in Massachusetts, a senate bill based on G.R. 37 was introduced in March 2021,[207] but the matter was deferred for further "investigation and study" (along with over 100 other criminal-justice-related bills) in February 2022.[208] The minority leader of the Mississippi Senate introduced a bill replicating California's A.B. 3070 in January 2021, but it died in committee without a vote the following month.[209]

Finally, even in states that have not yet begun any rulemaking or legislative process to reform peremptory strikes, appellate judges have issued calls for changes akin to those discussed above. In Iowa,[210] Montana,[211] and Oregon,[212] jurists have recently issued opinions calling for the abolition of peremptory strikes or their states' *Batson* frameworks. And

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204. See N.Y. Just. Task Force, Recommendations Regarding Reforms to Jury Selection in New York 16–19 (2022), http://www.nyjusticetaskforce.com/pdfs/Report-on-Recommendations-Regarding-Reforms-to-Jury-Selection-in-New-York.pdf [https://perma.cc/52XT-E29N].

205. See id. at 15 ("To fully implement [the *Batson* reform] recommendation, legislative action is required . . . ."); see also infra note 461 (indicating that a Washington-style reform could not be implemented by court rule in New York).

206. See Assemb. B. 8010, 2021–2022 Leg., Reg. Sess. (N.Y. 2021); S.B. 6066, 2021–2022 Leg., Reg. Sess. (N.Y. 2021).

207. S.B. 918, 192d Gen. Ct., 2021–2022 Sess. (Mass. 2021).

208. S.B. 2665, 192d Gen. Ct., 2021–2022 Sess. (Mass. 2022). It is worth noting that Massachusetts *has* made some changes to its *Batson* framework through the adjudicatory process in recent years, albeit more modest than the changes discussed above. In *Commonwealth v. Carter*, the Supreme Judicial Court extended *Batson* to sexual orientation under both the Massachusetts Constitution and the Fourteenth Amendment's Equal Protection Clause. 172 N.E.3d 367, 378–81 (Mass. 2021). While the majority opinion made no mention of the reforms underway elsewhere, a concurring justice noted that G.R. 37 had eliminated *Batson*'s "first step" in Washington and urged Massachusetts to follow suit. Id. at 389 (Lowy, J., concurring).

209. S.B. 2211, 2021 Leg., Reg. Sess. (Miss. 2021).

210. State v. Veal, 930 N.W.2d 319, 340 (Iowa 2019) (Cady, C.J., concurring specially) ("I . . . agree . . . that the solution in the future is to do away with the use of peremptory challenges."); id. (Wiggins, J., concurring in part and dissenting in part) ("I think it is time to abolish peremptory challenges in Iowa."); id. at 361 (Appel, J., concurring in part and dissenting in part) (urging adoption of a modified "*Batson* with teeth" standard, at least for elimination of the last minority juror).

211. State v. Wellknown, 510 P.3d 84, 97 (Mont. 2022) (Baker, J., concurring) ("[W]e should revisit Montana's approach to equal protection in the jury selection context, consistent with the Montana Constitution and with society's improved understanding of implicit bias.").

212. State v. Vandyke, 507 P.3d 339, 344 (Or. Ct. App. 2022) (Aoyagi, J., concurring) ("Unless reimagined, *Batson* will never live up to its stated purpose of 'eradicat[ing] racial discrimination' in jury selection. It will not even come close." (quoting Batson v. Kentucky, 476 U.S. 79, 85 (1986))).

in Kansas[213] and North Carolina,[214] racial justice task forces established by the states' governors have both recommended (among a suite of proposed reforms) changes to the law of jury selection.

* * *

Before moving on, a few points about the recent legal reform efforts warrant emphasis. First, in all of the above jurisdictions, what has animated reforms is *not* merely dissatisfaction with the *Batson* framework's ineffectiveness in curtailing intentional racial discrimination (or even that it fails to account for "unconscious bias"); rather, there has been a clear "focus[] on outcomes over intent,"[215] on grappling with the ways in which racial exclusion can arise from "race-neutral justifications that mirror the racial fault lines in society" (for example, prospective jurors' experiences with or perceptions of law enforcement and the courts).[216] The state courts' attentiveness to disparate impact in the jury selection context stands in sharp contrast to the U.S. Supreme Court's skepticism toward such an approach in other race discrimination contexts (at least when nonwhite claimants seek remedies for racial injury).[217]

Second, in every jurisdiction where reform efforts have gained traction, the proposals have faced organized opposition from prosecutors. In California, for example, the state's Association of Deputy District Attorneys insisted that A.B. 3070 was an "absurdity" designed "to make sure our juries are filled with unsuitable jurors."[218] In Arizona, the Arizona

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213. Governor's Comm'n on Racial Equity & Just., Initial Report: Policing and Law Enforcement in Kansas 23 (2020), https://governor.kansas.gov/wp-content/uploads/2020/12/CREJ-Report-December-1-2020_FINAL-1.pdf [https://perma.cc/J9VK-WY76].

214. See N.C. Task Force for Racial Equity in Crim. Just., Report 2020, at 102 (2021), https://ncdoj.gov/wp-content/uploads/2021/02/TRECReportFinal_02262021.pdf [https://perma.cc/K2MT-Q2WM].

215. See id.

216. People v. Triplett, 267 Cal. Rptr. 3d 675, 692 (Ct. App. 2020). Or perhaps one could view these measures as attempts to grapple with core undertheorized features of antidiscrimination law—How do we define a protected trait? When is action taken "because of" that trait?—in ways that depart from the U.S. Supreme Court's approach. For a thoughtful exploration of the difficulties posed by the "definition" and "mechanism" questions, see generally Deborah Hellman, Defining Disparate Treatment: A Research Agenda for Our Times, 57 Ind. L. Rev. (forthcoming 2024), https://ssrn.com/abstract=4409714 [https://perma.cc/QLS2-QW3A].

217. See Bridges, supra note 10, at 153–66; Reva B. Siegel, Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court, 66 Ala. L. Rev. 653, 660–61 (2015) ("[I]n the 1970s . . . many federal judges thought inquiry into the racial disparate impact of state action was constitutionally *required* under the Equal Protection Clause; but the Supreme Court instead held that inquiry into disparate impact was constitutionally *permitted*. . . . [Now,] equal protection might *prohibit* inquiry into disparate impact.").

218. Michele Hanisee, Opinion, Legislation Advances Allowing Sleeping, Hostile, and Unintelligible Jurors, Antelope Valley Times (May 20, 2020), https://theavtimes.com/

Prosecuting Attorneys' Advisory Council denounced a reform proposal as "untenable and illogical," accusing its authors of "assum[ing] nefarious motives of the prosecutors and courts."[219] Legal scholars have recently begun to explore the ways in which prosecutors, as an organized lobby, have been able to shape the trajectory of criminal law by influencing legislatures (and when those efforts have fallen short).[220] Whether the quasi-administrative/quasi-legislative process of judicial rulemaking is more insulated from these political dynamics—and, if so, which variables matter (for example, judicial elections)—is ripe for further exploration.[221]

Finally, although this Part has focused on the decisions of judges and legislators in adopting new jury selection regimes, the push to remake the law of jury selection has emerged from the organizing efforts of civil rights organizations, community activists, affinity bar groups, public defenders, academics, and even excluded prospective jurors.[222] While discontent with *Batson* has been building for years, the racial justice protests of 2020 put pressure on courts to reckon with the various ways state criminal justice practices have contributed to and reinforced racial inequality.[223] The law of jury selection is one area in which political mobilizations have translated into formal criminal legal reforms.

2020/05/20/op-ed-legislation-advances-allowing-sleeping-hostile-and-unintelligible-jurors/ [https://perma.cc/2QJB-LKMV].

219. Elizabeth Burton Ortiz, Comment of the Arizona Prosecuting Attorneys' Advisory Council at 2, In re Petition to Amend the Rules of the Sup. Ct. of Ariz. to Adopt Rule 24—Jury Selection, No. R-21-0008 (Ariz. filed Apr. 30, 2021), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=9652 [https://perma.cc/522S-T665] [hereinafter Comment of the APAAC].

220. See, e.g., Hessick et al., supra note 195, at 149–52.

221. For thoughtful examinations of how state supreme courts respond to majoritarian pressure, see Amanda Frost & Stefanie A. Lindquist, Countering the Majoritarian Difficulty, 96 Va. L. Rev. 719, 731–40 (2010); Stefanie A. Lindquist, Judicial Activism in State Supreme Courts: Institutional Design and Judicial Behavior, 28 Stan. L. & Pol'y Rev. 61, 68–69 (2017); see also Crespo, supra note 23, at 1379–88 (expounding on state judges' quasi-legislative role in the realm of plea bargaining).

222. See, e.g., Sloan, supra note 104, at 243–44 (discussing the movement in Washington); Emmanuel Felton, Many Juries in America Remain Mostly White, Prompting States to Take Action to Eliminate Racial Discrimination in Their Selection, Wash. Post (Dec. 23, 2021), https://www.washingtonpost.com/national/racial-discrimination-jury-selection/2021/12/18/2b6ec690-5382-11ec-8ad5-b5c50c1fb4d9_story.html (on file with the *Columbia Law Review*) (discussing the role of excluded jurors, activists, and academics in pushing for legal reform); see also supra note 167 and accompanying text (discussing the coalition in support of A.B. 3070); infra Part III (discussing the Arizona reforms).

223. See Felton, supra note 222 ("I'm being frank and realistic in saying that we had the advantage of the moment . . . . We got this passed in August 2020, just a few months after George Floyd was murdered, and it was one of several racial justice pieces that passed in the wake of his murder." (internal quotation marks omitted) (quoting interview with Professor Elisabeth Semel)).

III. ARIZONA SUPREME COURT'S ELIMINATION OF PEREMPTORY STRIKES

A closer look at a judicial rulemaking process in one state, Arizona, helps illustrate these dynamics. When the Arizona Supreme Court made the historic decision to eliminate peremptory strikes, it surprised most scholars, practitioners, and other court observers, particularly given the Arizona courts' traditional hostility to *Batson* claims.[224] Even if the court was dissatisfied with the status quo, there were other options available: At the time of the decision, the court had before it two dueling rule-change petitions, one of which (championed by the Arizona State Bar and civil rights organizations) urged reforms short of outright abolition.[225] Why, then, did the Arizona Supreme Court do away with peremptory strikes altogether? Why did a conservative court composed of seven Republican-appointed justices become the first to embrace Justice Marshall's call to get rid of peremptory strikes altogether?

This Part explores how reformers used the rulemaking process to enact arguably the most significant reform to the American jury in the past thirty-five years. We interview key actors to supplement the official record—which, notably, contains no official statement or reasoning from the Arizona Supreme Court—and thereby shed light on the various forces that shaped the process. At the time of the court's decision, the COVID-19 pandemic had already prompted Arizona courts to adjust their jury selection practices, and political pressure from the mass protests for racial justice that took place in the summer of 2020 were instrumental in building support for change. But another important narrative emerges from the official record and interviews with participants: Alongside concerns about racial exclusion, judicial aversion to the perceived "wokeness" of Washington and California's reforms provided the momentum necessary to abolish peremptory strikes. Arizona's "colorblind" rejection of peremptory strikes thus offers not only an important chapter in the history of the American jury but also a case study in racial justice advocacy in a less-than-hospitable political climate.[226]

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224. See infra notes 227–228 and accompanying text. On the other hand, Arizona has traditionally evinced a willingness to explore jury reforms. See, e.g., B. Michael Dann & George Logan III, Jury Reform: The Arizona Experience, 79 Judicature 280, 280 (1996) (recounting the Arizona Supreme Court's call for a jury service task force in 1993); Valerie P. Hans, Paula L. Hannaford & G. Thomas Munsterman, The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges, and Jurors, 32 U. Mich. J.L. Reform 349, 349–50 (1999) (noting the Arizona Supreme Court's adoption of a "sweeping set of changes [to] the state's jury system" in 1995).

225. See infra note 256.

226. Cf. Derrick A. Bell, *Brown v. Board of Education* and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 524 (1980) (arguing *Brown* "cannot be understood without some consideration of the decision's value to whites, not simply those concerned about the immorality of racial inequality, but also those whites in policymaking positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation").

A. *Backdrop*

Judged solely based on the success of *Batson* claims in state courts, Arizona might seem like an unlikely jurisdiction to adopt pioneering jury selection reforms. Indeed, between 2002 and 2019, Arizona courts reversed only one criminal conviction due to a *Batson* violation;[227] two more cases (including one involving a *Batson* claim challenging the exclusion of white male jurors) were remanded to the trial court for further proceedings.[228]

One of the appellate cases involving a rejected *Batson* claim was *State v. Gentry*, litigated by public defender (and chair of the local National Lawyers Guild (NLG) chapter) Kevin Heade in 2018.[229] There, in a case involving a Black defendant, prosecutors wielded a peremptory strike to remove from the venire the sole remaining Black juror.[230] When the court solicited a race-neutral rationale, the prosecutor explained that she was concerned that the juror's husband had "the same exact background" as the defendant and that the juror might "identify[] with the defendant and his wife" as a result.[231] To be sure, the record contained evidence indicating race-neutral similarities between the juror's husband and the defendant—both were military veterans, worked at banks, and had children by previous marriages—but Heade argued the racial subtext of "same exact background" was clear.[232] To no avail. The Court of Appeals rejected Gentry's appeal[233]—and his invitation to use the case as a vehicle to adopt a modified *Batson* framework modeled after Washington's G.R. 37[234]—and the Arizona Supreme Court denied review on January 7, 2020.[235] Two days later, the Central Arizona National Lawyers Guild

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227. State v. Brown, No. 1 CA-CR 13-0608, 2014 WL 2565551 (Ariz. Ct. App. June 5, 2014).

228. State v. Valenzuela, No. 1 CA-CR 11-0066, 2012 WL 1138985 (Ariz. Ct. App. Apr. 3, 2012); State v. Christian, No. 2 CA-CR 2009-0061, 2010 WL 1241096 (Ariz. Ct. App. Mar. 31, 2010); see also Jodi Knobel Feuerhelm, *Batson* Working Grp., Reply at 8–9, In re Petition to Amend the Rules of the Sup. Ct. of Ariz. to Adopt Rule 24—Jury Selection, No. R-21-0008 (Ariz. filed June 1, 2021), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=9912 [https://perma.cc/Q65F-FTVS] [hereinafter BWG Reply] (listing dubious justifications for strikes upheld under *Batson*).

229. 449 P.3d 707, 711 (Ariz. Ct. App. 2019).

230. Id. at 710.

231. Appellant's Opening Brief at 31, *Gentry*, 449 P.3d 707 (No. 1 CA-CR 18-0357), 2018 WL 6729565, at *32.

232. Id.

233. *Gentry*, 449 P.3d at 714.

234. Id. at 711 ("Defendant further asks that we adopt [Washington's] approach to peremptory challenges . . . , which carves out a list of reasons presumed invalid and . . . include[s] an 'objective observer' standard. . . . We are neither bound by Washington state law, nor are we inclined to ignore well-established Arizona legal precedent.").

235. Id. at 707.

petitioned the Arizona Supreme Court to adopt a new rule governing peremptory strikes that would track the Washington approach.[236]

As Heade explains it, he harbored no illusions that the 2020 NLG proposal "would lead to any meaningful change";[237] rather, he simply "went rogue," hoping that the proposal might "engender some public dialogue," a "first step" in what would likely be a decade-long process.[238] As Heade began soliciting support for the proposal, however, he encountered an unexpectedly receptive audience when he pitched the proposal to the State Bar's Civil Practice and Procedure committee.[239] Members of the committee persuaded Heade that he should withdraw his petition if he was serious about changing the rule. Instead, the State Bar would convene a *Batson* Working Group (BWG), study the proposal with key stakeholders, and develop a new proposal that could garner broader support.[240]

Two developments in the summer of 2020 reconfigured the political landscape, laying groundwork for that broad support to materialize: The courts were forced to adjust to the COVID-19 pandemic, and racial justice protests exploded across Arizona and the country. Both played a key role in the final decision to reject peremptory strikes altogether.

When the pandemic arrived in Arizona, the Arizona Supreme Court aimed to keep the state's courthouses running, but in some counties, would-be jurors sought "postponements and excusals" in such high numbers that "the number of prospective jurors [was] less than [what was] needed to schedule jury trials."[241] Traditionally, "large groups of jurors [would] report to the courthouse for jury selection," but this simply "was

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236. Kevin D. Heade, Petition at 10, In re Petition to Amend the Rules of the Sup. Ct. of Ariz.: Rule 24—Jury Selection, R-20-0009 (Ariz. filed Jan. 9, 2020), http://www.centralaznlg.org/wp-content/uploads/2020/12/central-az-nlg-petition-to-amend-the-rules-of-the-supreme-court-of-arizona-rule-24-jury-selection.pdf [https://perma.cc/2Z44-8UJN].

237. Telephone Interview with Kevin D. Heade, Chair, Cent. Ariz. Nat'l Laws. Guild (Sept. 22, 2022) [hereinafter Heade Interview].

238. Id.

239. Id.; Telephone Interview with Andrew Jacobs, *Batson* Working Grp. Member, State Bar of Ariz. (Sept. 29, 2022) [hereinafter Jacobs Interview].

240. Heade Interview, supra note 237; Jacobs Interview, supra note 239; see also Kevin D. Heade, Motion to Withdraw at 1, In re Petition to Amend the Rules of the Sup Ct. of Ariz.: Rule 24—Jury Selection, R-20-0009 (Ariz. filed May 19, 2020), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=7940 [https://perma.cc/NE6Z-FPL5] (discussing convening of State Bar efforts); Lisa M. Panahi, Comment of the State Bar of Arizona at 2, In re Petition to Amend the Rules of the Sup. Ct. of Ariz. by Adopting a New Rule: Rule 24—Jury Selection, No. R-20-0009 (Ariz. filed May 1, 2020), https://www.azcourts.gov/Rules-Forum/aft/1081 [https://perma.cc/NRF6-Y8LG] (same).

241. Samuel A. Thumma & Marcus W. Reinkensmeyer, Post-Pandemic Recommendations: COVID-19 Continuity of Court Operations During a Public Health Emergency Workgroup, 75 SMU L. Rev. Forum 1, 40 (2022), https://scholar.smu.edu/cgi/viewcontent.cgi?article=1039&context=smulrforum [https://perma.cc/3C6B-76RV].

not practical" given the imperatives of social distancing.[242] So, in addition to a host of other reforms (like conducting electronic jury questionnaires ahead of time), the court decided to sharply limit peremptory strikes by emergency administrative order.[243] In noncapital felony cases, both sides were limited to only two strikes; in misdemeanors, just one.[244] The emergency measure was initially slated to last only until the end of 2020, but the shift proved popular with trial court judges because it streamlined the jury selection process and allowed clerks to summon smaller venires.[245] "Judges had already become accustomed to fewer peremptory challenges," reported Professor Valena Beety, a member of the BWG.[246]

The other major event occurred on May 25, 2020: Within a matter of hours, Minneapolis police murdered George Floyd and a Phoenix trooper shot and killed an unarmed Black motorist named Dion Johnson.[247] While large protests occurred in towns small and large across the country, the killing of Johnson fueled especially large and militant protests in Phoenix and around Arizona.[248] For over a month,[249] thousands of protestors took to the streets on a nightly basis; police responded violently, arresting hundreds and often indiscriminately attacking protestors.[250] Citing the "violent civil disturbances and riots" in Arizona during the first few nights of protests, Governor Doug Ducey declared a state of emergency on May

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242. Id. at 41.

243. See In re Authorizing Limitation of Court Operations During a Public Health Emergency and Transition to Resumption of Certain Operations at 6, Admin. Order No. 2020-75 (Ariz. May 8, 2020), https://www.azcourts.gov/portals/22/admorder/orders20/2020-75.pdf [https://perma.cc/5PZG-JWFA].

244. See id.

245. Telephone Interview with Robert M. Brutinel, C.J., Ariz. Sup. Ct. (Apr. 22, 2022) [hereinafter Brutinel Interview]; Telephone Interview with Peter B. Swann, C.J., Ariz. Ct. App., Div. 1 (Sept. 23, 2022) [hereinafter Swann Interview]; supra text accompanying note 44.

246. Telephone Interview with Valena Beety, Professor of L., Ind. Univ. Maurer Sch. of L. & Member of the *Batson* Working Grp., State Bar of Ariz. (Oct. 10, 2022) [hereinafter Beety Interview].

247. Terry Tang, Family of Man Killed by Arizona Cop Wants Federal Probe, AP News (June 5, 2020), https://apnews.com/article/ac179d71e2260ab263e8641f25d71591 [https://perma.cc/6G74-YRDR].

248. See BrieAnna J. Frank, Andrew Oxford & Helena Wegner, Vandals Smash Windows at End of Night of Protests Over the Deaths of George Floyd, Dion Johnson, AZ Central (May 30, 2020), https://www.azcentral.com/story/news/local/phoenix-breaking/2020/05/29/phoenix-braces-another-night-protests-george-floyd-dion-johnson/5288308002/ [https://perma.cc/G8PV-2STS].

249. Alana Minkler, Protests Against Police Brutality to Continue in Metro Phoenix Thursday, AZ Central (June 25, 2020), https://www.azcentral.com/story/news/local/phoenix-breaking/2020/06/25/phoenix-area-protests-against-police-brutality-continue-thursday/3256804001/ [https://perma.cc/GVN9-J2ZR].

250. See, e.g., Uriel J. Garcia, Residents of Phoenix Neighborhood Say Police, Not Protesters, Were Problem on Sunday, AZ Central (June 1, 2020), https://www.azcentral.com/story/news/local/phoenix/2020/06/01/residents-phoenix-garfield-neighborhood-say-police-not-protesters-were-problem-protest/5312347002/ [https://perma.cc/AR4U-X92B].

30, 2020, which included an 8:00 PM curfew statewide that lasted more than a week.[251]

The protests put substantial pressure on the Arizona judiciary to demonstrate that the courts took seriously protestors' anger at racial injustice. Throughout June 2020, many state supreme courts (or their chief justices) took the unusual step of issuing public statements recognizing protestors' grievances and pledging to commit themselves to promoting racial equality.[252] The Arizona courts released no such statement. But, according to key actors, "there was a general sense in the judiciary that *something* had to be done, if for nothing else than to preserve the credibility of the state courts."[253]

B. *Dueling Proposals*

While protestors filled Arizona streets in May 2020, the State Bar first convened a *Batson* Working Group comprising prominent civil practitioners, criminal attorneys (both prosecutors and public defenders), civil rights lawyers, several judges, and a law professor.[254] The full group met more than a dozen times between May 2020 and January 2021, studying the academic literature on *Batson*, reviewing Arizona case law, and assessing strengths and weaknesses of recent reforms elsewhere.[255]

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251. Maria Polletta & Jessica Boehm, Ducey Declares State of Emergency, Announces Weeklong 8 PM Curfew, AZ Central (May 31, 2020), https://www.azcentral.com/story/news/politics/arizona/2020/05/31/arizona-gov-ducey-declares-state-emergency-weeklong-8-p-m-curfew/5301432002 [https://perma.cc/6XQF-3DMR] (internal quotation marks omitted) (quoting Governor Doug Ducey).

252. See State Court Statements on Racial Justice, Nat'l Ctr. for State Cts., https://www.ncsc.org/newsroom/state-court-statements-on-racial-justice [https://perma.cc/C3AY-XDC8] (last visited Sept. 26, 2023) (collecting statements from more than two dozen jurisdictions). Chief Justice Bernette Johnson of the Supreme Court of Louisiana, for example, wrote the following:

> [H]ear the voices of the protesters. So many feel our criminal legal system is part of the problem. . . .
>
> . . . [T]he glaring [class and race] disparities [in] the rate of arrests, severity of prosecutions and lengths of sentences for drug offenses [demonstrate] how we are part of the problem. Is it any wonder why many people have little faith that our legal system is designed to serve them or protect them from harm? Is it any wonder why they have taken to the streets to demand that it does?

Letter from Bernette Joshua Johnson, C.J., La. Sup. Ct., to Colleagues in the Jud., Exec., and Legis. Branches 1–2 (June 8, 2020), https://www.lasc.org/press_room/press_releases/2020/2020-18_Justice_for_All_in_Louisiana.pdf [https://perma.cc/596B-FEWK].

253. Swann Interview, supra note 245; see also Heade Interview, supra note 237 ("We had a historic uprising in the streets that demanded action . . . ."). But see Email from Robert M. Brutinel, C.J., Ariz. Sup. Ct., to Thomas Frampton, Assoc. Professor of L., Univ. of Va. Sch. of L. (Feb. 3, 2023) ("With due respect to Judge Swann, I was unaware of a 'general sense.' There were certainly individuals, like Judge Swann, who felt that way.").

254. BWG Proposal, supra note 42, app. B at 1 (listing group members).

255. Id. at 2.

The final proposal of the State Bar's BWG (like the earlier NLG proposal) adopted the overall structure of G.R. 37–style reforms undertaken elsewhere, though it expanded upon other jurisdictions' changes in ambitious ways. As in Washington and California, the BWG proposed the abolition of Step One of the *Batson* inquiry;[256] abandoned *Batson*'s ultimate focus on subjective intent; and declared "presumptively invalid" certain justifications closely correlated with a protected status or trait.[257] But the BWG proposal also went further—in ways that would ultimately trouble key stakeholders. Its proposed rule would have prohibited strikes targeting new characteristics of prospective jurors ("race, sex, gender, religion, national origin, ethnicity, disability, age, or sexual orientation").[258] Second, language in the proposed rule was more explicit than other jurisdictions' that "unconscious bias," as assessed from the vantage of an objective observer, rendered a strike invalid.[259] That is, a strike would be disallowed if "any reasonable person could view any of [the protected categories] as a conscious or unconscious factor in the use or waiver of a peremptory challenge."[260]

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256. Compare id. app. A at 1 (Arizona's proposed rule), with Wash. Ct. Gen. R. 37(d) (Washington's rule).

257. Compare BWG Proposal, supra note 42, app. A at 4 (Arizona's proposed rule), with Cal. Civ. Proc. Code § 231.7(e)–(g) (2023) (California's rule), and Wash. Ct. Gen. R. 37(d) (Washington's rule).

258. BWG Proposal, supra note 42, app. A at 2–4 (providing an expanded list of protected classes, beyond that of Washington's and California's recent reforms).

259. See id. app. A at 1, 2. The Maricopa County Attorney took particular issue with this provision:

> While the "reasonable person" standard is a well-known facet of the law, in this context it is useless. How is a judge to know what "*any* reasonable person *could* view" as a "conscious or *unconscious*" factor in a decision? Is a judge really in a position to rule, as a matter of law, whether a reason for a strike could possibly be seen by a reasonable person somewhere to *unconsciously* indicate that race, for example, was a factor in some way in the decision to strike? With this standard, the striking party and the judge could both be "consciously" certain that a strike was not racially based, but the judge could still find that some reasonable person somewhere *could* think that, even unconsciously, the reason had a racial component and be required to overrule the strike.

Kenneth N. Vick, Maricopa County Attorney's Comment in Opposition at 7, In re Petition to Amend the Rules of the Sup. Ct. of Ariz. to Adopt Rule 24—Jury Selection, R-21-0008 (Ariz. filed May 3, 2021), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=9789 [https://perma.cc/C4VL-WCT8].

260. BWG Proposal, supra note 42, app. A at 2. This is not to say that the Washington and California proposals ignored "implicit" or "unconscious" bias. Both jurisdictions' definitions provide that the "objective observer" or "reasonable person" (from whose perspective the strike should be assessed) must be aware that unconscious bias has resulted in the unfair exclusion of potential jurors historically. See Cal. Civ. Proc. Code § 231.7(d)(2)(A); Wash. Ct. Gen. R. 37(f).

From the outset, however, a competing proposal was in the works. Judge Peter Swann, a member of the BWG, made clear at the first meeting of the group that he intended to submit a competing petition that recommended the complete elimination of peremptory challenges.[261] For Swann, racial exclusion in jury selection presented a profound and intractable "moral crisis" for the courts.[262] But he feared that "the *Batson*-plus approach would be inefficient, impractical, and lead to more difficult litigation—concerns that are not present with an abolitionist approach."[263] Dispensing with peremptory strikes altogether, he explained, was both better policy and more likely to succeed:

> The very first meeting of the working group, I urged them to consider abolition. Everyone thought that I was some kook sitting on a hill. I kept pounding that drum: "You guys really need to think about something other than [reform] if you want to see it passed."[264]

While Swann was unable to convince the BWG that his proposal was realistic, he remained an active member of the group, and most members welcomed his competing proposal; if nothing else, the specter of abolition made their reform proposals seem more palatable.

But BWG members split on whether eliminating peremptory strikes was actually *preferable*. For some, the decision to mobilize for reform was purely tactical, especially in light of existing precedents for reform in California and Washington.[265] Reforming the basic *Batson* framework might ultimately "prop[] up an inefficient structure," but it still marked a meaningful improvement over the status quo, and "the possibility of eliminating peremptory challenges" seemed slim in any event.[266] For others, though, a targeted rule tailored to eliminate only *improper* peremptory strikes remained preferable to abolition. On this view, nondiscriminatory

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261. Swann Interview, supra note 245; see also Heade Interview, supra note 237. Swann's proposal was eventually coauthored with a colleague on Arizona's Court of Appeals, Division I, Judge Paul McMurdie. Swann and McMurdie had recently been on opposite sides of a *Batson* appeal: Swann voted to remand, while McMurdie believed no *Batson* violation had been established. See State v. Porter, 460 P.3d 1276, 1278 (Ariz. Ct. App. 2020), vacated, 491 P.3d 1100 (Ariz. 2021). In his dissent, however, McMurdie endorsed Washington's "objective observer" test but noted that "such a radical change to our state's implementation of the *Batson* framework" should come through rulemaking, a process "'better suited to consider the array of relevant studies and data in this area, along with the interests of the stakeholders.'" Id. at 1290–91 (McMurdie, J., dissenting) (quoting State v. Holmes, 221 A.3d 407, 437 n.25 (Conn. 2019)).

262. Swann Interview, supra note 245.

263. Id.

264. Id.

265. Heade Interview, supra note 237 (describing views of other participants).

266. Beety Interview, supra note 246; see also Jacobs Interview, supra note 239.

peremptory strikes could play an important and perhaps indispensable role in promoting fair trials for defendants.[267]

C. *"Too Woke"*

Both BWG and Judge Swann formally submitted proposals to the Arizona Supreme Court in January 2021, which opened a window of both formal and informal lobbying.[268] Organizations and individuals who submitted formal comments to the Arizona Supreme Court on the BWG's proposal overwhelmingly supported its recommendation, including numerous civil rights and civil liberties groups,[269] public interest law organizations,[270] public defenders,[271] and the State Bar of Arizona.[272] Comments on the competing proposal, meanwhile, were mostly negative, particularly those from individual trial attorneys who cautioned against stripping parties of control over the jury selection process. Even the local NLG chapter opposed the abolition petition, explaining that the ostensibly "fair and even-handed" path of abolition, by

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267. Beety Interview, supra note 246; Heade Interview, supra note 237 (providing a view that the BWG proposal was better when compared with abolition, at least at first).

268. Brutinel Interview, supra note 245; see also Beety Interview, supra note 246 (emphasizing that the dueling petitions were "*the* hot topic" at the state judicial conference in June 2021 where attendees "felt very comfortable sharing their opinions" as to the best path forward (and where members of the state's high court were in attendance)).

269. Dianne Post, Comment of the NAACP, In re Petition to Amend Ariz. Rules of the Sup. Ct. Rule 24 Regarding Jury Selection, No. R-21-0008 (Ariz. filed Feb. 11, 2021), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=9418 [https://perma.cc/7HQC-XZ85].

270. Amy Armstrong, Comment of the Arizona Capital Representation Project, In re Petition to Amend Ariz. Rules of the Sup. Ct., Rule 24 Regarding Jury Selection, No. R-21-0008 (Ariz. filed May 3, 2021), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=9811 [https://perma.cc/2XQB-PFPC]; David J. Euchner, Comment of the Arizona Attorneys for Criminal Justice, In re Petition to Amend the Rules of the Sup. Ct. of Ariz. to Adopt Rule 24—Jury Selection, No. R-21-0020 (Ariz. filed May 4, 2021), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=9850 [https://perma.cc/A8N3-K5EW].

271. Gary M. Kula, Comment of the Maricopa County Office of the Public Defender, In re Petition to Amend the Ariz. Rules of Sup. Ct. to Adopt Rule 24 on Jury Selection, R-21-0008 (May 3, 2021), https://www.azcourts.gov/Rules-Forum/aft/1196/afpg/2 [http://perma.cc/L53D-3KDC]; Annamarie L. Valdivia, Comment of the Pascua Yaqui Public Defenders Office, In re Petition to Amend the Rules of the Sup. Ct. of Ariz. to Adopt Rule 24—Jury Selection, No. R-21-0008 (Ariz. filed May 3, 2021), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=9786 [https://perma.cc/W7Q4-YARF].

272. Lisa M. Panahi, Comment of the State Bar of Arizona at 1, In re Petition to Amend the Ariz. Rules of Sup. Ct. to Adopt Rule 24—Jury Selection, No. R-21-0008 (Ariz. filed Apr. 30, 2021), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=9704 [https://perma.cc/GH28-3M55].

stripping defendants of their peremptory strikes, "reflect[s] a crucial misunderstanding of the interplay between race and power."[273]

But the proposal to do away with peremptory strikes garnered public support from one critical constituency: trial court judges. Nine of the ten members of the Yavapai County Superior Court bench, for example, submitted a formal comment in support of abolition, highlighting its "additional pragmatic and significant benefits" (apart from eliminating racial bias).[274] The judges noted that under the modified jury selection procedures employed during the pandemic, "the time needed to select a jury ha[d] dropped significantly," with several juries being "selected within an hour."[275] The speedier and more efficient jury selection process yielded "significant" benefits "for the Court and the citizenry."[276]

Beyond efficiency, judges from Mohave County emphasized their distaste for "scrutiniz[ing] lawyers' motives or the effect of race or ethnicity on the exercise of strikes," a process that the BWG's proposal preserved (and complicated).[277] Eliminating peremptory strikes avoided the awkward "guesswork" inherent in such inquiries, the judges explained.[278] By eliminating peremptory strikes altogether, judges could avoid having to ascertain whether an attorney's "rationale is legitimate or pretextual" or whether "race, ethnicity, or other status [was] a 'conscious or unconscious factor' in a strike."[279] Of course, the BWG's proposal aimed to address this concern by shifting from a subjective to an objective inquiry, but the Chief Justice of the Arizona Supreme Court, Robert Brutinel, dismissed the significance of this change:

> The assertion is that somehow it's easier for a judge to look at a prosecutor in the eye, and say, "An objective person would think you were motivated by racial animus," as opposed to him saying,

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273. Victor Aronow, Comment of the Central Arizona National Lawyers Guild Opposing the Abolition of Peremptory Strikes at 5, In re Petition to Amend Rules 18.4 and 18.5 of the Ariz. Rules of Crim. Proc. and Rule 47(e) of the Ariz. Rules of Civ. Proc., No. R-21-0020 (Ariz. filed Apr. 23, 2021), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=9571 [https://perma.cc/J3AD-H5MH].

274. John Napper, Comment of the Yavapai County Superior Court at 1, In re Petition to Amend Rules 18.4 and 18.5 of the Ariz. Rules of Crim. Proc. and Rule 47(e) of the Ariz. Rules of Civ. Proc., No. R-21-0020 (Ariz. filed Apr. 15, 2021), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=9462 [https://perma.cc/5XNY-TFCQ].

275. Id. at 2.

276. Id.

277. Charles W. Gurtler, Jr., Comment of the Committee on Superior Court at 3, In re Petition to Amend Rules 18.4 and 18.5 of the Ariz. Rules of Crim. Proc. and Rule 47(e) of the Ariz. Rules of Civ. Proc., No. R-21-0020 (Ariz. filed Apr. 12, 2021), https://www.azcourts.gov/DesktopModules/ActiveForums/viewer.aspx?portalid=0&moduleid=23621&attachmentid=9457 [https://perma.cc/VK9R-SNWM].

278. Id.

279. Id. (quoting BWG Proposal, supra note 42, app. A at 2).

> "Hey, you're a bigot" . . . . And I've been a trial judge. I don't think that's any easier.[280]

Outside of the formal comment system, criticism of the BWG reform proposal as "too woke" gained traction. Judge Swann recalled that the "wokeness" critique surfaced even within the BWG meetings:

> [I]t's so laden with connotations that I don't use [the term "woke"] anymore. The list of suspect classes kept growing and kept looking more and more slanted, if not in a raw political sense, at least in a cultural sense. It was slanted toward protecting certain groups and not others. And then we actually had people lobbying to protect their group in the list. What if you have a physical disability? Should that be included? I think there was a growing sense on the Working Group that the more you tried to do to prevent holes in the rule . . . the more difficulty they got into with drafting.[281]

Kevin Heade heard similar feedback as the proposals circulated: Many judges privately described the "Washington model," backed by the ACLU and NLG, as "too woke."[282] Prosecutors lauded the "goal" of eliminating bias as "commendable" but blasted the BWG's proposal as necessitating "intrusive questioning."[283] Because "[g]ender is not the same as sex," a prosecutors' group cautioned, "questions would need to be asked of each juror about their gender identification and sexual preference as well."[284] The "impracticable" reforms urged by the BWG, the Mohave County judges warned, only exacerbated the problem: "Virtually all prospective

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280. Brutinel Interview, supra note 245. A similar dynamic arose in California as A.B. 3070 advanced through the Legislature. After adamantly opposing the peremptory reform effort, attacking it as "an outrageous attempt to tell judges how to interpret the Constitution," a group of California judges later signaled their support for the wholesale elimination of peremptory strikes as "an actual solution" worth pursuing. Compare Letter from Directors, All. of Cal. JJ., to William J. Murray, Jr., Member, Cal. Jud. Council's Crim. L. Advisory Comm. (May 22, 2020) (on file with the *Columbia Law Review*), with Letter from Steve White, President, All. of Cal. JJ., to Anthony Rendon, Speaker, Cal. Assemb., and Shirley Weber, Mark Stone & Reggie Jones-Sawyer, Members, Cal. Assemb. (June 10, 2020) (on file with the *Columbia Law Review*).

281. Swann Interview, supra note 245. Chief Justice Brutinel confirmed that the scope of the reform proposal worried some: "Frankly, the *Batson* Working Group wanted to expand it to any suspect classification, and I suspect at least in Arizona that was going to be a bridge too far." Brutinel Interview, supra note 245. On the shifting meaning(s) of "woke," see, e.g., David Remnick, What Does "Woke" Mean, and How Did the Term Become So Powerful?, New Yorker: Pol. Scene Podcast (Jan. 30, 2023), https://www.newyorker.com/podcast/political-scene/what-does-woke-mean-and-how-did-the-term-become-so-powerful (on file with the *Columbia Law Review*); Aja Romano, A History of "Wokeness", Vox (Oct. 9, 2020), https://www.vox.com/culture/21437879/stay-woke-wokeness-history-origin-evolution-controversy [https://perma.cc/XN6H-96RH].

282. Heade Interview, supra note 237.

283. Comment of the APAAC, supra note 219, at 1.

284. Id. at 4; see also Vick, supra note 259, at 5–6.

jurors are members of the 'protected group' which suggests all peremptory strikes will be motivated for inappropriate reasons."[285] Gradually, the cleaner, simpler, and facially colorblind proposal to eliminate peremptory strikes—which didn't require judges to grapple with "implicit, institutional, and unconscious biases"—became comparatively appealing.[286]

Another flash point became the BWG's list of "presumptively invalid reasons" for a given strike,[287] which some stakeholders saw as lopsided and unlikely to capture discriminatory strikes advanced by defense counsel against white jurors.[288] For example, modeled on the frameworks adopted in Washington and California, the BWG proposal declared presumptively invalid a strike justified on the grounds that the prospective juror reported "past unfavorable experiences with law enforcement officers" or "a close relationship with people who have been stopped, arrested, or convicted of a crime."[289] But if such rationales were off-limits because they closely correlated with race, should a defense-initiated strike against a white prospective juror who reports *positive* experiences (or close family relationships) with law enforcement officials be similarly suspect? Chief Justice Brutinel emphasized that the appearance of such a double standard dampened support for the BWG reforms:

> "I've got a cousin in prison who's been arrested for the same offense, but I can be impartial." That's a hard one because likely they *can* be fair, but . . . [laughs]. You know, the State Bar petition had those specific questions, and you [would] not [be] allowed to ask those things anymore. And if you do, that's evidence of racial animus. But they didn't include [a rule against striking prospective jurors who disclose] "all [their] relatives are cops."[290]

The Maricopa County Attorney mocked the categorical restrictions: "We are told these are reasons that have been 'associated with improper discrimination' at some point. Annual petitions will no doubt follow to add new reasons to this list anytime a new law review article identifies another

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285. Kip Anderson, Comment of the Mohave County Superior Judges in Opposition at 1, In re Petition to Amend the Rules of the Sup. Ct. of Ariz. to Adopt Rule 24—Jury Selection, No. R-21-0008 (Ariz. filed Apr. 16, 2021), https://www.azcourts.gov/RulesForum/aft/1196 [https://perma.cc/3KAS-K86E].

286. BWG Proposal, supra note 42, app. A at 1; see also Beety Interview, supra note 246 ("Judges that I talked to felt that elimination [of peremptory strikes] was so much easier. They didn't want to have to deal with [assessing implicit bias].").

287. BWG Proposal, supra note 42, app. A at 4.

288. See Jacobs Interview, supra note 239 (noting strong opposition to the idea of "prohibited questions"); see also Swann Interview, supra note 245 ("When we got to 'what kinds of questions should be asked,' . . . it came to feel like we were watching MSNBC . . . . Everything was directed to bad experiences with police, and that's a big problem, but that's not the universe of problematic questions.").

289. BWG Proposal, supra note 42, at 1–2, app. A at 4.

290. Brutinel Interview, supra note 245.

objective fact that might be associated with discrimination somewhere in some context."[291]

A turning point came in May 2021, however, when jury selection data demonstrating large racial disparities in the use of peremptory strikes in the Maricopa County superior court emerged.[292] In official comments on the rule-change petitions, prosecutors had repeatedly emphasized that there were no Arizona-specific data supporting the allegations of racial bias in the selection of juries.[293] This position became untenable in the face of new data demonstrating that, in 2019, prosecutors "disproportionately struck [Black people] from juries 40% more than their population in the venire, and Native Americans 50% more than their population in the venire."[294] According to Andrew Jacobs, a BWG member who was instrumental in mobilizing State Bar support for the reform effort, the stark data "coming a year after the murder of George Floyd[] really took the legs out" of the opposition; the dramatic numbers bolstered the "moral force" of the reform effort in a way that was difficult to deny.[295]

The new data also bolstered the case for elimination (as opposed to reform), albeit in an unanticipated way: The numbers showed bias against white prospective jurors by defense attorneys.[296] Under *Georgia v. McCollum*, a defendant's use of a racially-motivated peremptory strike offends the Equal Protection Clause no less than a prosecutor's racially-motivated strike against a nonwhite juror,[297] but the data demonstrated that "[b]oth sides of every case . . . were using peremptories in a discriminatory manner."[298] The BWG reform proposal was crafted primarily to address racial bias by prosecutors that resulted in the overstriking of nonwhite jurors. But the competing petition anticipated that "evidence strongly suggests that race-based strikes [against white jurors] are used by defense counsel as well," and argued that abolition (as opposed to reform) would be "the fairest way to end the practice across the board."[299]

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291. Vick, supra note 259, at 8 (quoting BWG Proposal, supra note 42, app. A at 4).

292. Jacobs Interview, supra note 239; Superior Ct. of Ariz. in Maricopa Cnty., Racial and Ethnic Representation Through the Jury Selection Process 2 (2021), https://napco4courtleaders.org/wp-content/uploads/2021/06/Jury-Representation-Study-Superior-Court-in-Maricopa-County-May-2021.pdf [https://perma.cc/H2P4-97BG] [hereinafter Maricopa Cnty. Jury Selection Report].

293. See, e.g., Vick, supra note 259, at 2.

294. BWG Reply, supra note 228, at 1; see also Maricopa Cnty. Jury Selection Report, supra note 292, at 2.

295. Jacobs Interview, supra note 239.

296. Swann Interview, supra note 245; see also Maricopa Cnty. Jury Selection Report, supra note 292, at 2.

297. 505 U.S. 42, 55, 59 (1992).

298. Swann Interview, supra note 245.

299. Swann & McMurdie Petition, supra note 8, at 5; see also Swann Interview, supra note 245 (expressing skepticism that the Arizona Supreme Court would adopt a proposal that "just scolded prosecutors," noting that abolition "seemed more even-handed").

D. *Deliberations and Aftermath*

In August 2021, the Arizona Supreme Court met privately for their annual conference to consider petitions for new rules.[300] Many petitions prove uncontroversial, "go[ing] by without any debate at all," according to Chief Justice Brutinel.[301] Deliberation on the dueling jury selection petitions "was not like that; there was considerable debate."[302] Unlike other state supreme courts—some of which issue majority opinions, concurrences, and dissents with rule changes—the Arizona Supreme Court traditionally announces rule changes without explanation (or vote counts).[303] Thus, the momentous announcement came in the form of a brief order dated August 30, 2021, signed only by Chief Justice Brutinel, announcing the end of peremptory strikes, effective January 1, 2022.[304] The decision to do away with peremptory strikes, however, "was not unanimous."[305]

Those closest to the process identify a host of motivations for the ultimate adoption of the abolition proposal. The unrealized "promise of *Batson*," of course, loomed large: The court "certainly recognized that there was a perception at least that people of color were being stricken off juries in greater numbers" than they should be.[306] As much as this implicated the rights of defendants to receive a fair trial, the rights of the excluded jurors came to dominate the debate:

> In terms of effectuating people's constitutional rights to be able to *serve* on a jury, which is really what I think *Batson* is about, in order to make that process more effective and more efficient, [eliminating peremptory strikes] just makes a lot of sense. And I think that was probably the driving motivation; it certainly was for me, and [I suspect] for a number of my colleagues.[307]

Abandoning peremptory strikes would promote other forms of diversity too. Judge Swann noted that judges and lawyers (and medical

300. Brutinel Interview, supra note 245.

301. Id.

302. Id.

303. Compare, e.g., Rule XX Resolution, La. Sup. Ct. (Mar. 1999), https://www.lasc.org/Supreme_Court_Rules?p=RuleXXResolution499 [https://perma.cc/KL3L-MSBR] (containing six separate opinions on a rule change), with Order Amending Rule 34, Rules of the Arizona Supreme Court, on a Permanent Basis, No. R-12-0002 (Ariz. filed Sept. 2, 2016), https://www.azcourts.gov/Portals/20/2016%20Rules/R-12-0002.pdf [https://perma.cc/52S2-TPGD] (changing a rule without commentary).

304. Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, No. R-21-0020 (Ariz. filed Aug. 30, 2021), https://fingfx.thomsonreuters.com/gfx/legaldocs/egvbkkwkrpq/R-21-0020%20Final%20Rules%20Order.pdf [https://perma.cc/6HFH-2P4P].

305. Brutinel Interview, supra note 245.

306. Id.

307. Id.; see also Jacobs Interview, supra note 239 (emphasizing the importance of "fairness, equity, and citizenship rights of jurors, not just criminal defendants").

professionals in certain civil cases) rarely made it on to juries and speculated that broadening jury service in both racial and nonracial terms "resonated" with some of the justices when his proposal was adopted.[308] "We had been excluding swaths of people based not only on their race, based not only on their gender," Chief Justice Brutinel explained, but also "based on life experience[,] [which should be] the reason for the jury system, not a disqualifying factor."[309] Finally, issues of efficiency were a "throughline" for the entirety of the proposal process.[310] As Chief Justice Brutinel explained: "It was the timing . . . . We'd already effectively done it with an administrative order [limiting peremptory strikes during the pandemic]; the question is do we go back or do we go forward. We chose to go forward, at least in my view."[311]

Not everyone regarded the new rule as "going forward." In the state legislature, a group of nine Republican state representatives (with strong backing from prosecutors) promptly introduced H.B. 2413, an "emergency measure" to repeal the Arizona Supreme Court's rule and reinstate peremptory strikes.[312] By a vote of 28-29 (with three abstentions), the measure came up short in February 2022.[313] Had the measure passed, however, it would have precipitated a direct clash between coordinate branches, as the Arizona Constitution assigns to the Arizona Supreme Court (not the legislature) the "[p]ower to make rules relative to all procedural matters in any court."[314] Chief Justice Brutinel expressed skepticism that the legislative measure could have lawfully restored peremptory strikes: "If they came to me and said, 'We want to change your rules with regard to jury selection,' probably our response would be, 'That's of questionable constitutionality, that's going to get litigated . . . . So are you sure you want to go that direction?'"[315]

While the legislative repeal effort eventually failed, the heated debate underscores the uphill battle that reformers would have faced if those seeking to eliminate peremptory strikes had required the approval of the

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308. Swann Interview, supra note 245.

309. Brutinel Interview, supra note 245; see also id. ("The assertion that all [lawyers] want to do is pick a fair jury I always thought was laughable, because I've picked a number of juries, and that's not what I wanted at all!").

310. Heade Interview, supra note 237.

311. Brutinel Interview, supra note 245.

312. H.R. 2413, 55th Leg., 2d Reg. Sess. (Ariz. 2022); see also Valena Beety, Henry F. Fradella, Jessica M. Salerno, Cassia C. Spohn & Shi Yan, Opinion, Arizona Will Would End an Effort to Stop Racial Bias in Jury Selection Before It Begins [sic], AZ Central (Feb. 22, 2022), https://www.azcentral.com/story/opinion/op-ed/2022/02/22/arizona-bill-allowing-peremptory-challenges-would-stop-reform/6871234001 [https://perma.cc/AKB5-NAWF].

313. See Bill History for HB2413, Ariz. State Legislature, https://apps.azleg.gov/BillStatus/BillOverview [https://perma.cc/GM26-AZPA] (last visited Sept. 26, 2023).

314. Ariz. Const. art. VI, § 5(5).

315. Brutinel Interview, supra note 245.

Arizona Senate, House, and Governor. Of course, the Arizona Supreme Court could have announced a new framework for peremptory strikes while deciding a *Batson* appeal, perhaps construing Section 13 or Section 24 of Arizona's Declaration of Rights as requiring new procedures.[316] Indeed, defendants unsuccessfully proposed as much in cases that came before the Court in 2020[317] and 2021,[318] but Chief Justice Brutinel worried that such a move would have been asking too much of the constitutional text: "[S]aying as a matter of Arizona constitutional law that we have to get rid of peremptory strikes . . . might be on shaky ground."[319] And even if the legislature had the authority to enact equivalent reforms, political opposition from prosecutors and other trial attorneys would complicate efforts.[320] Legislators "are responsive to a number of constituents," Judge Swann explained, which reduces the chances of passing new measures that would upset the status quo.[321] The rulemaking process, on the other hand, offered the court a "cleaner" way to achieve the same ends.[322]

IV. STATE SUPREME COURTS' RULEMAKING AUTHORITY AND THE JURY

The unexpected abolition of peremptory strikes in Arizona, coupled with the recent movement to reform jury selection in other jurisdictions, presents an obvious question: Where else might rulemaking provide an avenue to remake the American jury system? Although it has become customary to think of the American jury as defined by landmark Supreme Court cases like *Batson* that establish a baseline federal constitutional floor—for example, *Duncan v. Louisiana* (incorporating a right to jury trial for non-petty offenses),[323] *Williams v. Florida* (authorizing six-person

316. Ariz. Const. art. II, § 13 ("No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."); id. art. II, § 24 ("In criminal prosecutions, the accused shall have the right . . . to have a speedy public trial by an impartial jury . . . ."); cf. Miller-El v. Dretke, 545 U.S. 231, 266–73 (2005) (Breyer, J., concurring) (arguing that the elimination of peremptory strikes is required by the Equal Protection Clause of the U.S. Constitution); Batson v. Kentucky, 476 U.S. 79, 102–08 (1986) (Marshall, J., concurring) (same).

317. See State v. Gentry, 449 P.3d 707, 710–11 (Ariz. Ct. App. 2019), review denied (Jan. 7, 2020) (invoking stare decisis to decline the defendant's request for the adoption of a Washington-style approach to peremptory challenges).

318. See State v. Porter, 491 P.3d 1100, 1106–07 (Ariz. 2021) (declining to amend the state's *Batson* framework to require express findings that the prosecutor's race-neutral reasons were "credible and non-pretextual").

319. Brutinel Interview, supra note 245.

320. See Hessick et al., supra note 195, at 191–92 (examining the success rates of procedural legislation with prosecutor support and opposition).

321. Swann Interview, supra note 245.

322. Brutinel Interview, supra note 245.

323. 391 U.S. 145, 157–58 (1968).

juries),[324] *Taylor v. Louisiana* (announcing the fair-cross-section requirement),[325] and *Ramos v. Louisiana* (mandating unanimity for conviction)[326]—state court rulemaking has long played a major and underappreciated role in shaping the jury's contours, even before the recent reforms. State supreme courts can, and do, promulgate rules establishing how many jurors sit on a petit jury[327] or grand jury.[328] They establish who has the requisite qualifications and impartiality to sit as a juror,[329] how bias is probed,[330] and whether jury pools adequately reflect the demographics of the community.[331] (In Georgia, for example, a now-repealed court rule mandated that the representation of women and racial minorities on jury lists deviate by no more than five percent from that group's representation in the most recent county census.)[332] And court rules can shape seemingly more mundane, but critically important, aspects of the jury, including what materials jurors can[333] and cannot[334] bring into

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324. 399 U.S. 78, 86 (1970).

325. 419 U.S. 522, 530 (1975).

326. 140 S. Ct. 1390, 1397 (2020).

327. See, e.g., Fla. R. Crim. P. 3.270 (providing for six-person juries for all noncapital criminal cases).

328. See, e.g., State v. Brown, 528 N.E.2d 523, 529–30 (Ohio 1988) (holding that Ohio Crim. R. 6(A), stating that grand juries shall consist of nine members, supersedes conflicting statutes requiring fifteen-person grand juries).

329. Compare, e.g., Iowa R. Crim. P. 2.18(5) (providing that "[a]ffinity or consanguinity, within the fourth degree" provides valid basis for "challenge for cause"), with Minn. R. Crim. P. 26.02(5)(1)(5) (providing "consanguinity or affinity, within the ninth degree" disqualifies a potential juror).

330. See, e.g., People v. Jackson, 371 N.E.2d 602, 603, 606 (Ill. 1977) (invalidating voir dire statute permitting parties to conduct voir dire as unconstitutional encroachment by the legislature upon the judicial branch and its conflicting Rule 234).

331. See Colo. R. Crim. P. 24(c)(4) ("At any time before trial, . . . the court may declare a mistrial in a case on the ground that a fair jury pool cannot be safely assembled in that particular case due to a public health crisis or limitations brought about by such crisis."); Ga. Unified Appeal Proc. R. II(C)(6), II(E) (repealed 2012); see also State v. Elbert, 424 A.2d 1147, 1150 (N.H. 1981) (requiring "all future jury lists . . . to be chosen at random from voter checklists," notwithstanding contrary statutes, based on the court's "administrative authority under N.H. Const., pt. II, art. 73-A").

332. See Williams v. State, 699 S.E.2d 25, 26 n.1 (Ga. 2010) (describing Rules II(C)(6) and II(E) of the Georgia Unified Appeal Procedure prior to amendment); see also Ricks v. State, 800 S.E.2d 307, 310 (Ga. 2017) (discussing the "forced balancing" system under those rules). Georgia jury selection is now governed by an exceptionally detailed set of rules first promulgated in 2012. See Ga. Jury Composition R.; *Ricks*, 800 S.E.2d at 320–23 (holding that the county's use of "legacy data," attempts to eliminate potential duplicate records, and efforts to remove "inactive" names through a national change-of-address database violated the Jury Composition Rule).

333. E.g., Ariz. R. Crim. P. 18.6(d)(3) (requiring juror access to notes and notebooks during recesses and deliberations).

334. E.g., State v. Weigle, 447 P.3d 930, 934 (Idaho 2019) (rejecting the argument that jurors improperly considered a demonstrative exhibit during deliberations in violation of Idaho Code § 19-2203 because that statute "encroaches on this Court's constitutional authority to establish the procedural rules for Idaho's courts").

the room when they deliberate. State supreme courts' authority over jury-related matters can even generate rules that starkly limit actors in other branches: A Minnesota court rule, for example, prohibits prosecutors from downgrading misdemeanors without the defendant's consent when doing so would sidestep the availability of a jury trial.[335]

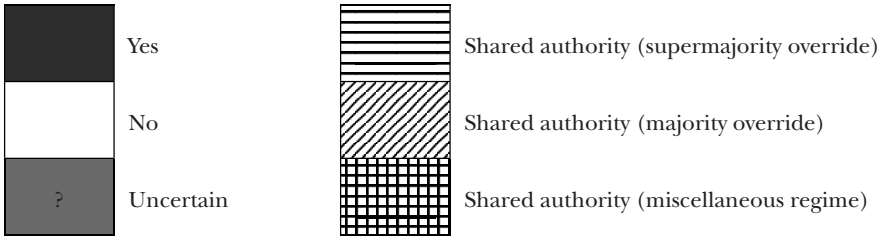
The states that have overhauled how peremptory strikes can be wielded, it turns out, are not exceptional in terms of the rulemaking authority of their state supreme courts (although the landscape is far from uniform). Exploring the feasibility of reforms to peremptory strikes along the lines of those enacted in Washington and Arizona offers a useful case study for exploring the intricacies, contradictions, and ambiguities of state court rulemaking. In his study of rulemaking's role shaping the law of plea bargaining, Andrew Manuel Crespo recently offered the first fifty-state review of judicial rulemaking powers in many decades.[336] Our analysis is indebted to and builds off his meticulous work (although, as noted in the following subsections and in our Appendix's footnotes, we differ as to our assessment of several jurisdictions when it comes to rulemaking concerning the jury). Overall, we find that state supreme court rulemaking has the potential to reshape jury selection in a large majority of states. And while certain aspects of this analysis are particular to peremptory strikes, much of it applies with equal force to criminal procedure generally, should an ambitious or assertive state supreme court seek to undertake such efforts.

Table 1 reflects the current source of authority for peremptory strikes under state law; the source of rulemaking authority in the state; and the authors' assessment of judicial rulemaking power to unilaterally implement Washington-style reform, to eliminate peremptory strikes, and to thwart legislative override attempts. Asterisks are used when a state's law leaves the answer to one of these questions unclear or particularly nuanced. For a more detailed explanation, see the expanded version of this Table (with accompanying footnotes) in Appendix A.

335. Minn. R. Crim. P. 23.04; see also State v. Johnson, 514 N.W.2d 551, 552–56 (Minn. 1994) (enforcing Minn. R. Crim. P. 23.04 even though it conflicts with a state statute). For a federal rule that similarly restricts prosecutors' traditionally unfettered discretion to drop charges, see Frampton, Rule 48(a) Dismissals, supra note 76, at 29.

336. See Crespo, supra note 23, at 1382–85; see also Donna J. Pugh, Chris A. Korbakes, James J. Alfini & Charles W. Grau, Judicial Rulemaking: A Compendium, at v (1984) (studying the rulemaking power of each state's high court).

TABLE 1. JUDICIAL POWER OVER PEREMPTORY STRIKES BY STATE



	Peremptory Challenges (Criminal)		Source of Rulemaking Authority			Washington-Style Reform?	Elimination?	Judicial Override?
	Court Rule	Statute	Constitution (express)	Inherent or Implied	Statute			
AL	✓	✓	✓	✓	✓		?	?
AK	✓		✓					
AZ	✓		✓	✓	✓			?
AR		✓	✓					
CA		✓	✓*					
CO	✓	✓	✓	✓	✓	?	?	
CT	✓	✓		✓	✓		?	?
DE	✓		✓		✓			
FL	✓	✓	✓		*			
GA		✓	✓	*	✓			
HI	✓	✓	✓	✓	✓			?
ID	✓	✓		✓	✓			
IL	✓	✓	✓	✓	✓			
IN	✓	✓		✓				
IA	✓			✓	✓			
KS	*	✓	✓	✓	✓			
KY	✓	*	✓	✓				?
LA		✓	✓			?		
ME	✓	*		✓	✓			
MD	✓	✓	✓					?
MA	✓			✓	✓			?
MI	✓	✓	✓		✓			
MN	✓			✓	✓			

	Peremptory Challenges (Criminal)		Source of Rulemaking Authority			Washington-Style Reform?	Elimination?	Judicial Override?
	Court Rule	Statute	Constitution (express)	Inherent or Implied	Statute			
MS	✓	✓		✓	*			
MO		✓	*					
MT		✓	✓					
NE		✓	✓					
NV	✓	✓		✓	✓			
NH	✓	✓	✓	✓	✓			
NJ	✓	✓	✓					
NM	✓	✓	✓	✓	✓			
NY		✓	*		*			
NC		✓	✓		✓			
ND	✓	✓	✓		✓			
OH	✓	✓	✓					
OK		✓		✓	✓	?		
OR		✓			*			
PA		✓	✓					
RI	✓				✓			
SC	✓	✓	✓		✓			
SD		✓	✓	✓	✓			?
TN	✓	✓		✓	✓			
TX		✓	✓		*			
UT	✓		✓		✓			
VT	✓	✓	✓		✓			?
VA		✓	✓		✓			
WA	✓			✓	✓			
WV	✓	✓	✓	✓	✓			
WI		✓			✓			?
WY	✓	✓		✓	✓			

A. *Washington-Style Reforms*

State supreme courts in at least thirty-five states possess the authority to unilaterally promulgate rules that could sharply limit or radically alter how peremptory strikes are wielded. Most often, this power derives from an explicit grant of such rulemaking power in a state constitution. The Article creating the judiciary in the Colorado Constitution is typical: It provides that "[t]he supreme court shall make and promulgate rules governing the administration of all courts and shall make and promulgate rules governing practice and procedure in civil and criminal cases."[337] In many states, the authority to promulgate rules is (additionally or alternatively) described by courts as "inherent,"[338] inferred from a positive grant of "administrative and supervisory authority" over subordinate courts,[339] or implied from general separation-of-powers principles.[340] In addition to these constitutional powers, many state legislatures have passed enabling statutes that delegate or "confirm" the rulemaking authority of their state supreme courts.[341]

The states that have abandoned the traditional *Batson* framework by state supreme court rulemaking illustrate each of these models. Arizona's constitution expressly grants its supreme court the "[p]ower to make rules relative to all procedural matters in any court."[342] As discussed earlier, New Jersey also has a long tradition of judicial supremacy, based on a constitutional grant of power to "make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts" (with "subject to the law" interpreted narrowly to mean "substantive" law only).[343] The Washington Constitution is silent as to rulemaking authority, but the Supreme Court of Washington has long held that "the promulgation of rules of procedure is an inherent attribute of the Supreme Court and an integral part of the judicial process."[344] This

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337. Colo. Const. art. VI, § 21; see also Mich. Const. art. VI, § 5 ("The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state."); Pa. Const. art. V, § 10 ("The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts . . . if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant . . . .").

338. See, e.g., State v. Delaney, 52 So. 3d 348, 351 (Miss. 2011); Newell v. State, 308 So. 2d 71, 76 (Miss. 1975).

339. See, e.g., Ill. Const. art. VI, § 16; see also Okla. Const. art. VII, § 6 (providing vague "administrative authority" language).

340. See, e.g., State v. Mitchell, 672 P.2d 1, 8 (Kan. 1983).

341. See, e.g., Conn. Gen. Stat. Ann. § 51-14 (West 2023); Del. Code tit. 11, § 5121 (2023); Haw. Rev. Stat. Ann. § 602-11 (West 2023); Ind. Code Ann. § 34-8-2-1 (West 2023); N.H. Rev. Stat. Ann. § 490:4 (2023).

342. Ariz. Const. art. VI, § 5.

343. N.J. Const. art. VI, § 2, para. 3; see also supra notes 83–87 and accompanying text.

344. State v. Smith, 527 P.2d 674, 677 (Wash. 1974) (holding court rule governing post-conviction bail trumps contrary statute).

robust understanding of the court's power is supplemented by a statutory delegation confirming the supreme court's power "to prescribe, from time to time" rules of pleading, practice, and procedure in order to "simplif[y]" the legal process and "promote the speedy determination of litigation on the merits."[345] Connecticut lacks a constitutional rulemaking provision, though the Connecticut legislature has authorized its judiciary to engage in rulemaking since at least 1821.[346]

A small number of jurisdictions qualify this judicial rulemaking authority by expressly conditioning validity on acquiescence by the legislature during a review period of specified length.[347] In Connecticut, "[a]ny rule or any part thereof disapproved by the General Assembly by resolution" during the session after the rule's reporting is rendered "void and of no effect";[348] in Iowa, a "legislative council" can temporarily delay the effective day of a proposed rule within sixty days, but a rule cannot be blocked unless the General Assembly passes a bill (signed by the Governor) doing so.[349] Ohio requires both houses of its legislature to pass resolutions to block a proposed rule,[350] which has occurred on several occasions for proposed rules of evidence.[351] Alaska,[352] Florida,[353] and Utah[354] submit proposed rules to the legislature, too, but only a two-thirds supermajority in both houses can block implementation. And in Arkansas, a two-thirds vote of each house can "annul[] or amend[]" court-promulgated rules governing certain subject matter, but this provision does not extend to court rules governing criminal procedure.[355] In each of these states, though, the judiciary—acting entirely on its own—would still have the authority to radically reshape through rulemaking how juries are constituted.

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345. Wash. Rev. Code Ann. § 2.04.190 (West 2023).

346. See 1821 Conn. Pub. Acts 137, § 5; see also In re Dattilo, 72 A.2d 50, 51 (Conn. 1950) (surveying Connecticut history). But see Heiberger v. Clark, 169 A.2d 652, 656 (Conn. 1961) ("The constitution of our state, adopted in 1818, divides the powers of government into three distinct departments . . . . Article fifth, § 1, states: 'The judicial power of the state shall be vested in a supreme court of errors['] . . . . Irrespective of legislation, the rule-making power is in the courts." (quoting Conn. Const. art. V, § 1 (amended 1982))).

347. See, e.g., Mont. Const. art. VII, § 2, para. 3 ("Rules of procedure shall be subject to disapproval by the legislature in either of the two sessions following promulgation.").

348. Conn. Gen. Stat. Ann. § 51-14 (West 2023).

349. Iowa Code § 602.4202 (2023).

350. Ohio Const. art. IV, § 5(B).

351. See Walton v. Elftman, 410 N.E.2d 1282, 1284 (Ohio Ct. C.P. 1980).

352. Alaska Const. art. IV, § 15.

353. Fla. Const. art. V, § 2(a).

354. Utah Const. art. VIII, § 4.

355. See Ark. Const. amend. LXXX, § 9; see also Op. Att'y Gen. No. 2003-030, at 14 (Ark. Feb. 21, 2003) (omitting rules of criminal procedure from the list of rules that the legislature can modify).

Because there are only a few states in which this general authority does not enable rulemaking reforms to the peremptory strike process, it is worth exploring the exceptions in greater detail. In Missouri, the state constitution affords its supreme court procedural rulemaking authority but expressly prohibits the promulgation of rules "relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal."[356] (And, indeed, the Missouri Supreme Court has held that its own rules "must be held to have no efficacy" when they impermissibly relate to trial by jury.)[357] The constitutions of New York,[358] North Carolina,[359] and Texas[360] assign rulemaking power to their legislatures, which can delegate authority over rules of criminal procedure to the judiciary, although no such delegations have occurred. And in California—where the legislature preempted the push for new rules by passing A.B. 3070—the California Supreme Court acting *alone* would have lacked the power to pass a Washington-style rule; there, rulemaking authority resides with a "Judicial Council" (which consists of judges, legislators, and appointees from the State Bar).[361]

The possibility for further Washington-style reforms through judicial rulemaking would likely face an additional hurdle in California, and the same obstacle might prohibit the Louisiana Supreme Court from promulgating Washington-style rules there. In both states, there is an explicit legal prohibition on judiciary-promulgated rules that conflict with statutes.[362] Many jurisdictions have such a rule, and ordinarily this proviso would do little to limit a Washington-style rule reforming the process by which peremptory strikes are exercised: There is no "inconsistency" between a rule sharply curtailing *how* or *when* a peremptory strike can be wielded and a statute fixing the total number of such strikes. But in Louisiana (and now, post–A.B. 3070, in California[363]), an unusually detailed statutory scheme governs peremptory strikes, and such legislative enactments might preempt the field.[364] Louisiana's "codification" of *Batson* seems calculated to impose no restrictions greater than the bare constitutional minimum demanded by the Equal Protection Clause (and, in fact, purports to

356. Mo. Const. art. V, § 5.

357. State v. McClinton, 418 S.W.2d 55, 62 (Mo. 1967).

358. N.Y. Const. art. VI, § 30.

359. N.C. Const. art. IV, § 13(2).

360. Tex. Const. art. V, § 31(c).

361. Cal. Const. art. VI, § 6(a), (d).

362. Id. § 6(d) ("The rules adopted [by the Judicial Council] shall not be inconsistent with statute."); La. Const. art. V, § 5(A) ("[The supreme court] may establish procedural and administrative rules not in conflict with law . . . .").

363. See supra text accompanying notes 170–178.

364. See La. Code Crim. Proc. Ann. art. 795 (2023).

authorize practices that plainly violate *Batson* and its progeny).[365] Such legislative frameworks make it hard to imagine how a G.R. 37–type rule could be "consistent" with what the legislature has established.

B. *Eliminating Peremptory Strikes*

A trickier question is whether a particular state supreme court possesses the authority to entirely eliminate peremptory strikes by court rule, as the Arizona Supreme Court did. To be sure, the more expansive powers required to abolish peremptory strikes are rarer than those required to reform the peremptory strike process, but in our analysis, the elimination of peremptory strikes could be accomplished through judicial rulemaking in at least thirty states.

A primary reason a state supreme court might possess the power to reform, but not abolish, is the aforementioned requirement that court rules be "consistent" with state statutes. In dozens of states, statutes currently fix the number of peremptory strikes allocated to the parties, sometimes standing alone and sometimes in parallel with a similar court rule. In the subset of jurisdictions with such statutes *and* "consistency" requirements, rulemaking could produce reforms that radically restricted the use of peremptory strikes—but a court rule reducing peremptory challenges to zero would create an impermissible conflict. Such frameworks would block rulemaking to end peremptory strikes in jurisdictions like Georgia, Hawaii, Nebraska, Oklahoma, Vermont, and Virginia.[366]

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365. Under a recent version of La. Code Crim. Proc. Ann. art. 795(C) (2016), judges were directed *not* to solicit a race-neutral or sex-neutral explanation for a dubious peremptory strike, prima facie case of discrimination notwithstanding, if "the court is satisfied that such reason is apparent from the voir dire examination of the juror." See 2019 La. Sess. Law Serv. Act 235 (West) (eliminating this text from the statute). The Supreme Court summarily reversed a Louisiana conviction in 2016 where this occurred, with four Justices explaining that *Batson* was concerned with the actual subjective motivations of prosecutors, not "judge-supplied reasons" for why the prosecutor might have acted. See Williams v. Louisiana, 136 S. Ct. 2156, 2157 (2016) (Ginsburg, J., concurring in the decision to grant certiorari, vacate, and remand). Similarly, although the U.S. Supreme Court has directed that "all of the relevant facts and circumstances" be considered when evaluating the existence of a prima facie case at Step One, see, e.g., Flowers v. Mississippi, 139 S. Ct. 2228, 2235 (2019), the Louisiana statute provides that courts are barred from considering a prosecutor's dubious peremptory strike (for any purpose) if the defendant simultaneously asks for the juror's removal. See La. Code Crim. Proc. Ann. art. 795(D) (2023). Thus, the most suspicious peremptory strikes by prosecutors—those where the minority juror seemed so pro-prosecution that the defendant is happy to have the juror dismissed—cannot be evidence that supports the inference of discrimination when assessing the prosecutors' *other* challenged strikes. See State v. McCoy, 218 So. 3d 535, 589 (La. 2016), rev'd on other grounds, 138 S. Ct. 1500 (2018). This issue has arisen repeatedly in recent high-profile cases, but so far, the U.S. Supreme Court has declined to grant certiorari on the issue. See, e.g., Petition for a Writ of Certiorari at i, McCoy v. Louisiana, 138 S. Ct. 53 (2017) (No. 16-8255), 2017 WL 4310769 (presenting the simultaneous strikes question); *McCoy*, 138 S. Ct. at 53–54 (only granting certiorari on a different question).

366. See infra Appendix A.

A separate issue that could hamstring such rulemaking is the diverse approaches states have adopted to evaluating whether rules touching upon peremptory strikes are "procedural" or "substantive."[367] As noted earlier,[368] state courts have come to different conclusions when compelled "to enter the logical morass" that is "distinguishing between substantive and procedural rules,"[369] particularly when it comes to rules impacting the jury. Most states regard such rules—including those involving peremptory strikes—as "procedural" in nature, and therefore within the domain of judicial rulemaking. The Supreme Court of Pennsylvania, for instance, has held that "[t]he right to trial by jury is not a 'substantive right,' but a right of procedure through which rights conferred by substantive law are enforced."[370] As a result, courts with exclusive procedural rulemaking power have struck down jury-related statutes—for example, a statute creating the right to a jury trial for cases of indirect criminal contempt[371] or a statute requiring a prosecutor to assent to a defendant's waiver of a jury[372]—as unconstitutional. Likewise, in 2013, an appellate court in Kentucky heard a constitutional challenge to Kentucky's court rule fixing the number of peremptory strikes allotted to defendants; the court rejected the argument "that the question of peremptory strikes is one of substantive law and therefore beyond the 'practice and procedure' authority granted to the Supreme Court in § 116 of the Kentucky Constitution."[373] Ohio's supreme court, however, has held that while a rule setting forth "the time and manner as well as the number of times such [a] right may be exercised" is "procedur[al]," the underlying right to peremptory strikes is "substantive."[374] Thus, under Ohio law, a rule akin to Washington's would likely pass constitutional muster, but a rule that is "so restrictive as to constitute a *de facto* abrogation or modification of the right itself" (for example, the elimination of peremptory strikes through court

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367. In this regard, although it has apparently been forgotten, it is notable that the U.S. Supreme Court modified the (statutory) allocation of peremptory strikes when it first promulgated the Federal Rules of Criminal Procedure in 1944. Compare Fed. R. Crim. P. 24(b) (1946) (entitling both prosecution and defense to twenty peremptory challenges in capital cases), with 28 U.S.C. § 424 (1940) (only entitling the prosecution to six peremptory challenges in capital cases). As should now be clear, however, the fact that a particular rule might be "procedural" for purposes of the federal Rules Enabling Act does not guarantee that a state supreme court would categorize it the same way.

368. See supra notes 88–91 and accompanying text.

369. Mistretta v. United States, 488 U.S. 361, 392 (1989) (citing Sun Oil Co. v. Wortman, 486 U.S. 717 (1988)).

370. Commonwealth v. McMullen, 961 A.2d 842, 847–48 (Pa. 2008) (internal quotation marks omitted) (quoting Commonwealth v. Sorrell, 456 A.2d 1326, 1329 (Pa. 1982)).

371. Id.

372. *Sorrell*, 456 A.2d at 1328–29.

373. Spencer v. Commonwealth, 2012-CA-000996-MR, 2013 WL 4033897, at *2 (Ky. Ct. App. Aug. 9, 2013).

374. State v. Greer, 530 N.E.2d 382, 395 (Ohio 1988).

rule) would likely fail.[375] Alaska has drawn a similar line to Ohio's when faced with challenges to the state's system of challenging judges.[376]

In Colorado—where (1) reform efforts are well underway[377] and (2) judicial rulemaking has a long and robust history[378]—the procedure/substance issue might also complicate any movement to abolish peremptory strikes (even if a Washington-style reform is well within the Colorado Supreme Court's power). Lower courts have split over whether court rules governing the *number* of peremptory strikes alter "substance" or "procedure."[379] The latest modification to Colorado's Rule 24, which governs peremptory strikes and other jury-related matters, was upheld in 2022;[380] an appellate court ruled that a new amendment authorizing the court to "declare a mistrial in a case on the ground that a fair jury pool cannot be safely assembled" due to the pandemic was "procedural in nature."[381] There is thus, at minimum, some uncertainty about the viability of a court rule seeking to eliminate peremptory strikes in Colorado.

C. *Conflict*

But what might happen if a state legislature challenged a state supreme court's (re)assertion of a robust rulemaking authority? In Arizona, such a conflict nearly occurred, when the legislature's attempt to reinstate peremptory challenges by statute fell short by a single vote.[382]

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375. Id. at 396.

376. In Alaska, both a statute and a court rule grant parties one peremptory challenge to an assigned judge. Alaska Stat. § 22.20.022 (2023); Alaska R. Crim. P. 25(d). The right to a peremptory challenge is a "substantive right," the Alaska Supreme Court has explained, but the court rule governing how such challenges are exercised is "procedural." Gieffels v. State, 552 P.2d 661, 667–68 (Alaska 1976) (emphasizing that a court rule may permissibly "regulate[] the means or method by which a party's peremptory challenge takes effect" but may "not infringe upon the substantive right created by statute"). Importantly, however, the legislature has not enacted an analogous statutory provision conferring a substantive right to challenge jurors; in Alaska, the peremptory strike of a juror is purely a creature of court rule.

377. See supra notes 190–198 and accompanying text (describing these efforts).

378. See McCormick, supra note 80, at 664–68 (describing this history).

379. Compare People v. Hollis, 670 P.2d 441, 442 (Colo. App. 1983) ("Concluding that the right to peremptory challenges is substantive, and not merely procedural, we hold that the statute controls."), with People v. Reynolds, 159 P.3d 684, 689 (Colo. App. 2006) ("It could be argued that, contrary to *Hollis*, the number of peremptory challenges afforded in a criminal case is in fact a matter of procedure, in which the rule rather than the statute controls. . . . However, we do not decide that issue here . . . ."). See also People v. Montoya, 942 P.2d 1287, 1296 (Colo. App. 1996) (holding that the trial court erred in applying the court rule, as opposed to the statute, related to the replacement of jurors).

380. See People v. Eason, 516 P.3d 546, 553 (Colo. App. 2022) (rejecting a constitutional challenge to a court rule governing jury selection during a public health emergency).

381. Id. at 551, 553.

382. See Bill History for HB2413, supra note 313; see also H.B. 2413, 55th Leg., 2nd Reg. Sess. (Ariz. 2022).

Had the vote gone otherwise, a constitutional conflict would have unfolded—perhaps the judiciary would have declared the law to be an unconstitutional usurpation of the judiciary's authority,[383] or perhaps the court would have repromulgated a superseding rule. Would state law permit such pushback? The answer, of course, is hugely consequential for any effort by a state supreme court to undertake criminal procedure reform outside of the legislative or adjudicatory process. Though they have largely flown under the radar in contemporary legal scholarship, such state-level crises *have* occasionally surfaced in recent decades. And again, unsurprisingly, a careful examination of state law reveals a wide diversity of approaches to resolving such conflicts. Still, while aspects of our assessment are necessarily more speculative here, state supreme courts could both make and defend substantial changes to their state's criminal procedure (even in the face of unified legislative opposition) in a surprisingly high number of jurisdictions.

Consider the results in two states, Arkansas and Florida, that witnessed such rulemaking conflicts in more recent years. The Arkansas Supreme Court and General Assembly were recently embroiled in a decade-long battle over "tort reform," and specifically a package of new laws known as the Civil Justice Reform Act of 2003 (CJRA), which cleared the legislature with near-unanimous bipartisan support.[384] Business groups and insurers hailed the Act, which limited liability mainly through procedural changes: It heightened pleading requirements for medical malpractice claims, fixed venue for such actions to the place of the alleged act or omission, eliminated joint liability and introduced nonparty fault, and limited both compensatory and punitive damages.[385] In earlier cases, the Arkansas Supreme Court had recognized that "there is a crepuscular, or twilight, zone which makes it difficult to determine whether the legislature or the judiciary should establish some procedures."[386] But in the wake of the CJRA, the Arkansas Supreme Court adopted a far more capacious view of its own powers. The court gradually gutted core provisions of the CJRA, emphasizing that the court's procedural rules, not those imposed by the legislature, governed civil litigation.[387] Irate legislators responded by proposing constitutional amendments to strip the judiciary of rulemaking

383. See supra text accompanying note 315.

384. See Ark. Code Ann. §§ 16-55-201 to -220 (2023).

385. Id.

386. Curtis v. State, 783 S.W.2d 47, 48 (Ark. 1990); see also Citizens for a Safer Carroll Cnty. v. Epley, 991 S.W.2d 562, 564 (Ark. 1999) (holding that a procedural statute might trump a rule "when the statutory rule [was] based upon a fixed public policy which [was] legislatively or constitutionally adopted and ha[d] as its basis something other than court administration" (citing *Curtis*, 783 S.W.2d at 47)).

387. Johnson v. Rockwell Automation, Inc., 308 S.W.3d 135, 141–42 (Ark. 2009) (invoking amendment 80 to declare unconstitutional a nonparty liability provision); see also Broussard v. St. Edward Mercy Health Sys., Inc., 386 S.W.3d 385, 387 (Ark. 2012) (declaring unconstitutional a statutory provision requiring that "proof in medical-malpractice cases

authority.[388] While this retaliatory response ultimately stalled in the General Assembly,[389] the agitation compelled the Arkansas Supreme Court to appoint a "Special Task Force" to study the wisdom of reforms contained in the CJRA.[390] The court eventually adopted several new rules mirroring those it had previously struck down[391] but chastised "those interested in these issues" for their "failure" to participate in the court's ordinary rulemaking process.[392]

Florida's recent rulemaking conflict, involving criminal rules, followed a similar trajectory. Under Florida law, although the legislature can repeal any rule of the Florida Supreme Court by a two-thirds vote, it lacks authority to enact laws relating to procedure on its own.[393] In 2000, however, the legislature unanimously passed a bill prohibiting "nonmonetary pretrial release" for those charged with misdemeanor domestic violence at their first appearance hearing.[394] To do so, the act partially repealed two court-promulgated bail rules and amended an existing statute to limit bail eligibility for those charged with misdemeanor domestic violence.[395] The Florida Supreme Court acknowledged that the unanimous repeal of its rules was proper, but because the statutory amendments were procedural in nature, the adoption of new statutory language represented an unconstitutional encroachment on the court's power.[396]

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must be made by expert testimony by 'medical care providers of the same specialty as the defendant'" (quoting Ark. Code Ann. § 16-114-206(a) (2012))); Bayer CropScience LP v. Schafer, 385 S.W.3d 822, 831 (Ark. 2011) (declaring unconstitutional, on other grounds, statutory cap on punitive damages); Summerville v. Thrower, 253 S.W.3d 415, 416 (Ark. 2007) (declaring unconstitutional the requirement that medical-malpractice complaints include "an affidavit of reasonable cause within thirty days of filing a complaint" under amendment 80).

388. See Sevawn Foster, Note, Constitutional Law—Arkansas's Current Procedural Rulemaking Conundrum: Attempting to Quell the Political Discord, 37 U. Ark. Little Rock L. Rev. 105, 115–16 (2014) (discussing a state senator's proposal to bestow Arkansas's General Assembly with the power "to enact laws that adopt, amend, affect or supersede the court's rules").

389. As a compromise measure, state senators passed a nonbinding resolution calling on the Arkansas Supreme Court "to adopt policies and procedures to implement the tort reforms" akin to those in the CJRA. See S. Res. 30, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).

390. In re The Appointment of a Special Task Force on Prac. & Proc. in Civ. Cases, 2013 WL 3973978, at *1 (Ark. Aug. 2, 2013) (per curiam) ("The extended debate in the recent session of the Arkansas General Assembly over both the substance of court rules and changes to this court's constitutional . . . authority to promulgate those rules . . . has revealed the need for review and/or revision of some sections of the Arkansas Rules of Civil Procedure.").

391. Id. at *2; In re Special Task Force on Prac. & Proc. in Civ. Cases, 2014 Ark. LEXIS 439, at *2 (Ark. Aug. 7, 2014) (adopting rules proposed by task force with modifications).

392. *In re The Appointment of a Special Task Force*, 2013 WL 3973978, at *2.

393. In re Clarification of Fla. Rules of Prac. & Proc., 281 So. 2d 204, 204 (Fla. 1973).

394. State v. Raymond, 906 So. 2d 1045, 1051 & n.3 (Fla. 2005).

395. Id.

396. Id. at 1051.

This ruling, however, created "a vacuum" in the bail law: Given the lawful repeal of the old bail rules and the judicial invalidation of the statute, there was now nothing in Florida law dictating "when [if ever] trial judges may consider these defendants for nonmonetary pretrial release."[397] To fill the gap, the court announced that it was re-adopting the just-repealed rules "in their entirety," notwithstanding the fact that the legislature had just unanimously (and constitutionally) rejected them.[398] As in Arkansas, the court signaled that it was willing to undertake a new rulemaking study that "reflect[ed] the Legislature's intent," but the judiciary also refused to be rushed: "We are particularly concerned that we be fully informed as to the policy concerns of the Florida Legislature before we take any final action on these rules."[399] Almost two years later, the court amended the bail provisions of the Florida Rules of Criminal Procedure, effectively implementing the rejected statute.[400]

In both states, state supreme courts demonstrated a willingness to defend their primary authority over an expansive realm of "procedural" matters, even when addressing controversial subject matter, and even when confronting overwhelming legislative opposition. To be sure, while jealously guarding their procedural rulemaking authority, these judiciaries ultimately accommodated many of their legislatures' policy preferences in subsequent promulgated rules. But traditions of comity and collaboration do not always reign. Probably the most "extreme" example in modern times comes from Mississippi, where in 1982 the state's high court simply announced that its new Rules of Civil Procedure were law, notwithstanding the legislature's express rejection of the package.[401] The legislature had passed a detailed enabling act to govern the rulemaking process, one that

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397. Id.

398. Id.

399. Id. at 1051–52.

400. See In re Fla. Rules Crim. Proc. 3.131 & 3.132, 948 So. 2d 731, 733 (Fla. 2007) (adding language from the rejected statute to Rule 3.131). The recent fight over bail reform in Illinois involved similar separation-of-powers issues. There, in 2021, the General Assembly passed a host of criminal justice reforms, including provisions that "dismantled and rebuilt Illinois's statutory framework for the pretrial release of criminal defendants." Rowe v. Raoul, No. 129248, 2023 WL 4566587, at *1 (Ill. July 18, 2023). Prosecutors and other law enforcement officials challenged the constitutionality of the reforms, arguing (inter alia) that "because bail is an administrative matter for the courts, the legislature encroached upon the authority of the judiciary." Id. at *4. This argument prevailed below, but in July 2023 the Illinois Supreme Court reinstated the law, recognizing a cooperative role for the legislature in regulating the bail system. Id. at *9–10.

401. William H. Page, Constitutionalism and Judicial Rulemaking: Lessons From the Crisis in Mississippi, 3 Miss. Coll. L. Rev. 1, 2 (1982) (citing Order Adopting the Mississippi Rules of Civil Procedure (Miss. May 26, 1981)); see also Leslie Southwick, Recent Trends in Mississippi Judicial Rule Making: Court Power, Judicial Recusals, and Expert Testimony, 23 Miss. Coll. L. Rev. 1, 3 (2003) ("The impasse may have been the kind that could be broken by compromise and the passage of time. The supreme court was only briefly inclined to find out.").

envisioned a cooperative process of shared responsibility over rulemaking, but the court simply ignored it.[402] Threats of budget cuts[403] and impeachment[404] immediately followed, but legislators "[f]inally . . . relented," and since then "the principle of supreme court absolute rule-making authority in Mississippi [has not been] open to debate."[405] (The court similarly ratified Rules of Criminal Procedure, without legislative approval, in 2016.)[406] In many other states, courts of last resort have unambiguously held that their rules prevail over any conflicting statute.[407]

At the other end of the spectrum are jurisdictions where the legislature's authority to modify court-promulgated rules is firmly established. Alabama's constitution, for instance, provides that court "rules may be changed by a general act";[408] the Hawaii Supreme Court has held that "legislative fiat would prevail over a contrary rule interpretation";[409] and Nebraska considered giving its supreme court "unrestricted" procedural rulemaking power at its 1920 constitutional convention but ultimately rejected that approach, opting instead to allow legislative override.[410] Few of these jurisdictions have had to directly consider what might happen if a

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402. Southwick, supra note 401, at 2–3 (discussing 1975 Miss. Laws 501, § 19 (codified at Miss. Code Ann. § 9-3-69 (2023))).

403. Id. at 3.

404. See Hall v. State, 539 So. 2d 1338, 1365 (Miss. 1989) (Hawkins, P.J., dissenting) ("Had I had any inkling then that this Court would some day assert the [even broader rulemaking] power the majority does now, I would have saved [the legislature] the trouble of [an impeachment] hearing. I would have walked over and pleaded guilty."); Page, supra note 401, at 6 (discussing rumors of the "removal of pro-Rules justices . . . using a near-forgotten provision of the state constitution" (citing Miss. Const. art. IV, § 53)).

405. Southwick, supra note 401, at 3, 7. But some are, in fact, still actively debating and contesting this perceived usurpation. See Channing J. Curtis & Christopher R. Green, Forty Years Across the Rubicon, 92 Miss. L.J. 681, 686 (2023) ("[T]he Mississippi Rules of Court were all adopted unconstitutionally. Their adoption, without the constitutional authority to do so and against the constitutional prohibition of exercising the powers of another branch, has muddied the procedural process in Mississippi."). Channing Curtis and Professor Christopher Green identify several areas in which the Mississippi Code and court rules currently conflict, and cite recent litigation involving these "contradictions," suggesting the issue remains very much live in Mississippi. Id. at 715–24.

406. See William L. Waller, Jr., A Message From Chief Justice William L. Waller, Jr., *in* Supreme Court of Mississippi 2016 Annual Report (2016), https://courts.ms.gov/research/reports/SCTAnnRep2016.pdf [https://perma.cc/HYC2-KYGZ] ("Years of study of criminal rules concluded on December 15, 2016, with the Supreme Court's unanimous adoption of the Mississippi Rules of Criminal Procedure.").

407. See infra Appendix A; see also People v. Jackson, 371 N.E.2d 602, 603, 606 (Ill. 1977) (invalidating a statute that "encroache[d] upon the rulemaking power of th[e] court"); State v. Mitchell, 672 P.2d 1, 9 (Kan. 1983) ("[W]hen court rules and a statute conflict . . . the court's constitutional mandate [to enact rules of procedure] must prevail.").

408. Ala. Const. art. VI, § 150 (formerly art. VI, § 6.11).

409. Burpee v. Garibay, No. 25421, 2006 WL 457861, at *2 (Haw. Feb 23, 2006); see also Funger v. Mayor of Somerset, 223 A.2d 168, 173 (Md. 1966) (noting that "the Legislature may rescind, change or modify a rule of this Court").

410. Peck v. Dunlevey, 172 N.W.2d 613, 615–16 (Neb. 1969).

state supreme court chose to repromulgate its previous court rule in response to a statutory change—effectively what the Florida Supreme Court did when it reissued its bail rules[411]—but the general thrust of the case law is that the rulemaking power is ultimately "subordinate to the General Assembly" in cases of conflict.[412]

Between these two poles are those states that have underdeveloped case law or that have gone out of their way to avoid direct conflict. Sometimes this conflict aversion produces odd results. In *Foster v. Overstreet*, a high-profile capital murder case, the Kentucky Supreme Court agreed with the defendant that a procedural statute governing the challenging of a judge for bias "represents an encroachment by the legislature on the power of the judiciary to make rules" and therefore held that the law was unconstitutional.[413] In the next sentence, however, the court announced that it would "extend[] comity to the legislature" out of "'deference and respect'" and allow the unconstitutional law to stand.[414] (Comity is warranted, the Kentucky Supreme Court unhelpfully elaborated, whenever the statute is a "'statutorily acceptable' substitute" for the court rule.)[415] Wisconsin law "envision[s] the legislature and judiciary exercising shared power" over criminal procedure rulemaking, and the Wisconsin Supreme Court has upheld statutes that do not "undu[ly] burden or substantial[ly] interfere[] with judicial powers."[416] The court has not specified, however, when a statute revising a court rule *would* unduly burden or substantially interfere with judicial powers.[417] And in some jurisdictions, legislatures retain the power to amend a court rule by statute, but a subsequently enacted court rule literally amends the legislature's statute.[418] Thus, the South Dakota Supreme Court has, by rule, amended the statute governing peremptory strikes in civil cases.[419] How a full-blown

411. See In re Fla. Rules of Crim. Proc. 3.131 & 3.132, 948 So. 2d 731, 733 (Fla. 2007) (adding language from the rejected statute to Rule 3.131).

412. See Stokes v. Denmark Emergency Med. Servs., 433 S.E.2d 850, 852 (S.C. 1993).

413. 905 S.W.2d 504, 506 (Ky. 1995).

414. Id. (quoting O'Bryan v. Hedgespeth, 892 S.W.2d 571, 577 (Ky. 1995)); see also State v. Leonardis, 375 A.2d 607, 614 (N.J. 1977) (noting the authority that the New Jersey legislature and judiciary both have over the rules of pretrial intervention).

415. *Foster*, 905 S.W.2d at 507. The Court's "deference and respect" was qualified, however; the Court "reserve[d] the right to review in the future this procedure and present refinements or alterations to it," id., perhaps in cases with less notorious defendants.

416. Demmith v. Wis. Jud. Conf., 480 N.W.2d 502, 508 (Wis. 1992).

417. See id. at 509 (noting that the legislature's standards may "not infringe on the judiciary's power" without expounding further).

418. See, e.g., S.D. Const. art. V, § 12 ("These rules may be changed by the Legislature."); see also S.D. Sup. Ct. R. 97-40 (amending S.D. Codified Laws § 23A-20-26 (1997)).

419. S.D. Sup. Ct. R. 97-40 (amending S.D. Codified Laws § 23A-20-26).

conflict between the judiciary and the legislature in one of these last-in-time jurisdictions might ultimately play out is difficult to gauge.

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Much of the foregoing assumes, of course, that past case law will dictate future outcomes. But another important way in which state supreme courts vary from one another (and often their federal counterpart) is in their willingness to strike down legislative enactments and overrule past decisions.[420] Institutional design (particularly judicial selection and retention laws), changes in personnel,[421] local political pressures, and a host of other considerations might prompt a state supreme court to depart from past practice. If anything, though, this indeterminacy supports our thesis: The landscape of state supreme court rulemaking is extraordinarily diverse and extraordinarily consequential. And in many jurisdictions, judicial rulemaking is a viable path toward fundamentally rewriting the rules of the American jury.

CONCLUSION

The willingness of state supreme courts to revisit *Batson*—and, as significantly, to address racial exclusion through a paradigm that decenters subjective discriminatory intent—marks a noteworthy shift in American criminal procedure. The fact that these reforms are occurring not through the development of new constitutional doctrine or legislation but mainly through judicial rulemaking represents another significant development. But this recent wave of reform should be historicized: The new rules reshaping jury selection represent just the latest chapter in a long-standing

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420. Lindquist, supra note 221, at 84 ("The data [in a study of all state supreme court decisions between 1995 and 1998] revealed substantial variation across the state courts in terms of their propensity to invalidate a state statute."); id. at 101 ("From a descriptive standpoint, the data . . . reveals considerable variation across state supreme courts in terms of their respective propensities to overrule precedent.").

421. See, e.g., Nick Corasaniti, Left-Leaning Wisconsin Groups Challenge the State's Political Maps, N.Y. Times (Aug. 2, 2023), https://www.nytimes.com/2023/08/02/us/politics/wisconsin-maps-protasiewicz.html (on file with the *Columbia Law Review*) ("A day after a seismic ideological shift on the Wisconsin Supreme Court, a coalition of voting rights groups and left-leaning law firms filed a legal challenge to the state's legislative districts . . . ."); Jordan Smith, The Florida Supreme Court Is Radically Reshaping Death Penalty Law, The Intercept (Dec. 30, 2020), https://theintercept.com/2020/12/30/florida-supreme-court-death-penalty-law/ [https://perma.cc/X482-RSD5] ("Over the last year, th[e] newly conservative [Florida Supreme Court] has devoted a good amount of time to undoing precedents that provide safeguards to capital defendants . . . ."); Michael Wines, North Carolina Gerrymander Ruling Reflects Politicization of Judiciary Nationally, N.Y. Times (Apr. 28, 2023), https://www.nytimes.com/2023/04/28/us/north-carolina-supreme-court-gerrymander.html (on file with the *Columbia Law Review*) (last updated May 2, 2023) ("On Friday, the same court led by a newly elected Republican majority looked at the same facts, reversed itself and said it had no authority to act.").

tug-of-war for control over criminal procedure between state judiciaries and legislatures.

And if rulemaking can eliminate peremptory strikes in a jurisdiction like Arizona, it might be worth considering how additional reforms could further reshape the law of the jury. How much skepticism of police and prosecutors (or sensitivity to structural racism) should be countenanced before a juror is disqualified from service "for cause"?[422] As Justice Goodwin Liu (joined by Justice Mariano-Florentino Cuéllar) highlighted in California, recent focus on *Batson* notwithstanding, "there is significant evidence that removal of jurors for cause is an equally if not more significant contributor to the exclusion of Black jurors" than peremptory strikes.[423] The "current standards and processes for excusal of prospective jurors for cause [and how they] contribute to racial disparities in jury selection and to implicit biases in the resulting petit juries," they argue, should also be a target for reformers.[424] From rules regulating the demographics of jury pools to rules governing how many jurors it takes to comprise a "jury,"[425] rulemaking (rather than constitutional litigation[426]) may be the more promising path forward.

Or consider criminal procedure more broadly. For those looking to the U.S. Supreme Court to meaningfully address the many pathologies of our criminal legal system, and the racial disparities it reflects and reproduces, the constitutional landscape appears bleak. In recent terms, the Court's conservatives have repeatedly signaled a willingness to revisit landmark decisions, from *Miranda v. Arizona* to *Gideon v. Wainwright*.[427]

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422. See, e.g., DeVaughn v. State, 769 S.E.2d 70, 74 (Ga. 2015) (holding that *Batson* does not govern for cause strikes and a juror's "bad experiences with police and prosecutors" sufficed for a for cause strike); Lindsey v. State, 916 N.E.2d 230, 236 (Ind. Ct. App. 2009) (upholding a for cause strike of a juror with negative police experiences as neither illogical nor arbitrary); Commonwealth v. Williams, 116 N.E.3d 609, 612–13 (Mass. 2019) (discussing for cause dismissal of juror based on her belief that "the system is rigged against young African American males").

423. People v. Suarez, 471 P.3d 509, 567 (Cal. 2020) (Liu, J., concurring); accord Frampton, For Cause, supra note 94, at 788 (stating that "equivalent racial disparities" as exist in peremptory strikes "pervade the exercise of challenges for cause").

424. *Suarez*, 471 P.3d at 568 (Liu, J., concurring).

425. See supra notes 327–335 and accompanying text.

426. See Khorrami v. Arizona, 143 S. Ct. 22, 23 (2022) (Gorsuch, J., dissenting from the denial of certiorari) (urging Court to revisit precedent holding that a twelve-member jury "'is not a necessary ingredient' of the Sixth Amendment right to trial by jury" (quoting Williams v. Florida, 399 U.S. 78, 86 (1970))).

427. See Vega v. Tekoh, 142 S. Ct. 2095, 2106 n.5 (2022) (suggesting that the Court lacks "the authority to create constitutionally based prophylactic rules [like those announced in Miranda v. Arizona, 384 U.S. 436 (1966)] that bind both federal and state courts"); Flowers v. Mississippi, 139 S. Ct. 2228, 2269 (2019) (Thomas, J., dissenting) (suggesting that *Batson* was wrongly decided); Garza v. Idaho, 139 S. Ct. 738, 756–59 (2019) (Thomas, J., dissenting) (attacking the Court's right-to-counsel jurisprudence, including Gideon v. Wainwright, 372 U.S. 335 (1963), as inconsistent with the Sixth Amendment's original meaning); Berghuis v. Smith, 559 U.S. 314, 334 (2010) (Thomas, J., concurring)

And key features of the Court's already-anemic Equal Protection Clause jurisprudence are in flux.[428] But just as laws are often "stupid but constitutional,"[429] so too may a rule of procedure be "prudent but not constitutionally required." Throughout the United States, little but imagination restrains a motivated state supreme court from wielding its rulemaking power, regardless of the direction in which the U.S. Supreme Court takes constitutional criminal procedure in the coming years.

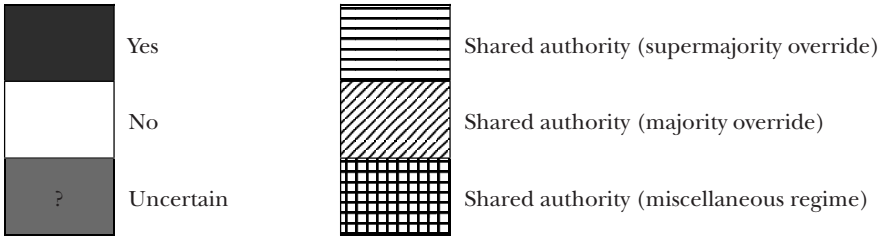
("[I]n an appropriate case I would be willing to reconsider our precedents articulating the 'fair cross section' requirement.").

428. See, e.g., Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 143 S. Ct. 2141, 2167 (2023) ("The interests that respondents seek [through racial diversity], though plainly worthy, are inescapably imponderable."). But see id. at 2248 (Sotomayor, J., dissenting) ("[The newly constituted Court] strikes at the heart of [its own precedent] by holding that racial diversity is an 'inescapably imponderable' objective that cannot justify race-conscious affirmative action, . . . even though respondents' objectives simply 'mirror the "compelling interest" this Court has approved' many times in the past." (first quoting id. at 2167 (majority opinion); then quoting Fisher v. Univ. of Tex., 579 U.S. 365, 382 (2016))).

429. Jennifer Senior, In Conversation: Antonin Scalia, N.Y. Mag. (Oct. 4, 2013), https://nymag.com/news/features/antonin-scalia-2013-10/ (on file with the *Columbia Law Review*) ("[T]hey ought to pass out to all federal judges a stamp, and the stamp says—*Whack!* [*Pounds his fist.*]—STUPID BUT CONSTITUTIONAL. *Whack!* [*Pounds again.*] STUPID BUT CONSTITUTIONAL!" (quoting Justice Antonin Scalia)).

APPENDIX A

Appendix A reflects the current source of authority for peremptory strikes under state law; the source of rulemaking authority in the state; and the authors' assessment of judicial rulemaking power to unilaterally implement Washington-style reform, to eliminate peremptory strikes, and to thwart legislative override attempts. Asterisks are used when a state's law leaves the answer to one of these questions unclear or particularly nuanced.



	Peremptory Challenges (Criminal)		Source of Rulemaking Authority			Washington-Style Reform?	Elimination?	Judicial Override?
	Court Rule	Statute	Constitution (express)	Inherent or Implied	Statute			
AL[430]	✓	✓	✓	✓	✓		?	?
AK[431]	✓		✓					
AZ[432]	✓		✓	✓	✓			?
AR[433]		✓	✓					
CA[434]		✓	✓*					
CO[435]	✓	✓	✓	✓	✓	?	?	
CT[436]	✓	✓		✓	✓		?	?
DE[437]	✓		✓		✓			
FL[438]	✓	✓	✓		*			
GA[439]		✓	✓	*	✓			
HI[440]	✓	✓	✓	✓	✓			?
ID[441]	✓	✓		✓	✓			
IL[442]	✓	✓	✓	✓	✓			
IN[443]	✓	✓		✓				

	Peremptory Challenges (Criminal)		Source of Rulemaking Authority			Washington-Style Reform?	Elimination?	Judicial Override?
	Court Rule	Statute	Constitution (express)	Inherent or Implied	Statute			
IA[444]	✓			✓	✓			
KS[445]	*	✓	✓	✓	✓			
KY[446]	✓	*	✓	✓				?
LA[447]		✓	✓			?		
ME[448]	✓	*		✓	✓			
MD[449]	✓	✓	✓					?
MA[450]	✓			✓	✓			?
MI[451]	✓	✓	✓		✓			
MN[452]	✓			✓	✓			
MS[453]	✓	✓		✓	*			
MO[454]		✓	*					
MT[455]		✓	✓					
NE[456]		✓	✓					
NV[457]	✓	✓		✓	✓			
NH[458]	✓	✓	✓	✓	✓			
NJ[459]	✓	✓	✓					
NM[460]	✓	✓	✓	✓	✓			
NY[461]		✓	*		*			
NC[462]		✓	✓		✓			
ND[463]	✓	✓	✓		✓			
OH[464]	✓	✓	✓					
OK[465]		✓		✓	✓	?		
OR[466]		✓			*			
PA[467]		✓	✓					
RI[468]	✓				✓			
SC[469]	✓	✓	✓		✓			
SD[470]		✓	✓	✓	✓			?
TN[471]	✓	✓		✓	✓			

	Peremptory Challenges (Criminal)		Source of Rulemaking Authority			Washington-Style Reform?	Elimination?	Judicial Override?
	Court Rule	Statute	Constitution (express)	Inherent or Implied	Statute			
TX[472]		✓	✓		*			
UT[473]	✓		✓		✓			
VT[474]	✓	✓	✓		✓			?
VA[475]		✓	✓		✓			
WA[476]	✓			✓	✓			
WV[477]	✓	✓	✓	✓	✓			
WI[478]		✓			✓			?
WY[479]	✓	✓		✓	✓			

430. **Peremptory Challenges (Criminal)**: Ala. Code § 12-16-100 (2023); Ala. R. Crim. P. 18.4. **Source of Rulemaking Authority**: Ala. Const. art. VI, § 150 ("The supreme court shall make and promulgate rules governing the . . . practice and procedure in all courts; provided, however, that such rules shall not abridge, enlarge or modify the substantive right of any party . . . . These rules may be changed by a general act of statewide application."); Ala. Code § 12-2-7 ("The Supreme Court shall have authority . . . [t]o make and promulgate rules governing the administration of all courts and . . . [the] practice and procedure in all courts; provided, that such rules shall not abridge, enlarge, or modify the substantive right of any party . . . ."); Williams v. Knight, 169 So. 871, 876 (Ala. 1936) ("This court has the right to make rules in the exercise of its inherent power . . . ."). **Washington-Style Reform**: See Alabama Constitution, statute, and case law governing courts' rulemaking authority cited above. **Elimination**: Some uncertainty regarding elimination stems from Clark v. Container Corp. of Am., 589 So. 2d 184, 196 (Ala. 1991), and Jawad v. Granade, 497 So. 2d 471, 476–77 (Ala. 1986), which express skepticism toward "attempt[s] to judicially abolish, curtail, or diminish the constitutional right to trial by jury." *Jawad*, 497 So. 2d at 476. There might exist a nonfrivolous argument that wholesale elimination of peremptory strikes offends the constitutional and statutory provisions "preserv[ing]" trial by jury from judicial rulemaking. Id. **Judicial Override**: The legislature plainly has the right to "change[] by a general act of statewide application" a rule promulgated by the judiciary. Ala. Const. art. VI, § 150. But subsequently promulgated procedural rules generally supersede statutes under Alabama law. See Schoenvogel ex rel. Schoenvogel v. Venator Grp. Retail, Inc., 895 So. 2d 225, 236 (Ala. 2004); Op. of the Justs. No. 229, 342 So. 2d 361, 361 (Ala. 1977); see also Ala. Code § 12-1-1 (providing that a statutory procedural provision "shall apply only if the procedure is not governed by . . . [a] rule of practice and procedure as may be adopted by the Supreme Court of Alabama").

431. **Peremptory Challenges (Criminal)**: Alaska R. Crim. P. 24. **Source of Rulemaking Authority**: Alaska Const. art. IV, § 15 ("The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts."). **Washington-Style Reform**: See Alaska Constitution governing courts' rulemaking authority cited above. **Elimination**:

Case law on Alaska's practice of allowing peremptory strikes *of judges* suggests judicial rulemaking is appropriate to regulate the *procedure* of how peremptory strikes are exercised but indicates that the right itself is *substantive*, implying that elimination through rulemaking would not be permissible. See Gieffels v. State, 552 P.2d 661, 667–68 (Alaska 1976). This "substantive" right to challenge judges, however, was created by statute. See id.; see also Alaska Stat. § 22.20.022 (2023). No analogous statutory provision governs peremptory strikes of jurors. **Judicial Override**: Court rules "may be changed by the legislature by two-thirds vote of the members elected to each house." Alaska Const. art. IV, § 15.

432. **Peremptory Challenges (Criminal)**: Ariz. R. Crim. P. 18.4. **Source of Rulemaking Authority**: Ariz. Const. art. 6, § 5(5); Ariz. Rev. Stat. Ann. § 12-109 (2023); Ariz. Podiatry Ass'n v. Dir. of Ins., 422 P.2d 108, 110 (Ariz. 1966) ("Since the amendment of Article 6, § 5, of the constitution, . . . this court not only has the inherent power to make rules, but it has this power under the constitution, and this power may not now be reduced or repealed by the legislature."). **Washington-Style Reform**: See Arizona Constitution, statute, and case law governing courts' rulemaking authority cited above. **Elimination**: See Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, supra note 304. **Judicial Override**: See, e.g., State v. Bigger, 492 P.3d 1020, 1030 (Ariz. 2021) ("The legislature may not enact a statute that conflicts with our rulemaking authority."). During the 2022 debate, however, some legislators contended that a statute reinstating peremptory strikes would be *substantive* rather than *procedural*; had H.B. 2413, 55th Leg., 2nd Reg. Sess. (Ariz. 2022), passed, that (open) issue would have been before the Arizona Supreme Court. See Brutinel Interview, supra note 245.

433. **Peremptory Challenges (Criminal)**: Ark. Code Ann. § 16-33-305 (2023); Ark. R. Crim. P. 32.2 (referencing voir dire and peremptory strikes, but only in passing). **Source of Rulemaking Authority**: Ark. Const. amend. LXXX, § 3 ("The Supreme Court shall prescribe the rules of pleading, practice and procedure for all courts; provided these rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as declared in this Constitution."). **Washington-Style Reform**: See Arkansas Constitution governing courts' rulemaking authority cited above. **Elimination**: Johnson v. Rockwell Automation, Inc., 308 S.W.3d 135, 141 (Ark. 2009) ("[R]ules regarding pleading, practice, and procedure are solely the responsibility of this court."). **Judicial Override**: Under Amendment LXXX, § 9, while the legislature may repeal certain court-promulgated rules by a two-thirds vote, this mechanism would not apply to a rule of criminal procedure. Ark. Const. amend. LXXX, § 3.

434. **Peremptory Challenges (Criminal)**: Cal. Civ. Proc. Code § 231.7 (2023); Cal. Penal Code § 1046 (2023) (referencing civil jury rules). **Source of Rulemaking Authority**: Rulemaking authority is vested with the Judicial Council rather than the Supreme Court of California. See Cal. Const. art. VI, § 6(d) ("[T]he council shall survey judicial business and make recommendations to the courts, make recommendations annually to the Governor and Legislature, [and] adopt rules for court administration, practice and procedure . . . . The rules adopted shall not be inconsistent with statute."). **Washington-Style Reform, Elimination, Judicial Override**: Rulemaking authority is vested with a Judicial Council that does not consist entirely of the judiciary. See Cal. Const. art. VI, § 6(a), (d).

435. **Peremptory Challenges (Criminal)**: Colo. Rev. Stat. § 16-10-104 (2023); Colo. R. Crim. P. 24(d). **Source of Rulemaking Authority**: Colo. Const. art. VI, § 21 ("The supreme court shall make and promulgate rules governing the administration of all courts and . . . [the] practice and procedure in civil and criminal cases, except that the general assembly shall have the power to provide simplified procedures in county courts for the trial of misdemeanors."); Colo. Rev. Stat. § 13-2-109 (2023); Kolkman v. People, 300 P. 575, 584–85 (Colo. 1931). **Washington-Style Reform**: See Colorado Constitution, statute, and case law governing courts' rulemaking authority cited above. Although the Colorado Supreme Court is currently contemplating a new Washington-style reform, lower appellate courts have reached different conclusions as to whether peremptory strikes are procedural or substantive in nature. Compare People v. Hollis, 670 P.2d 441, 442 (Colo. App. 1983) (deeming peremptory strikes a substantive right), with People v. Reynolds, 159 P.3d 684, 689

(Colo. App. 2006) (suggesting that, "contrary to *Hollis*, the number of peremptory challenges afforded in a criminal case [may be] a matter of procedure, in which the rule rather than the statute [would] control[]"). **Elimination**: Whether judicial rulemaking could be used to eliminate peremptory strikes turns on the same procedural–substantive issue discussed above. **Judicial Override**: Assuming rulemaking concerning peremptory strikes is procedural, Colorado law is clear that "in cases of conflict, the court's procedural rule would necessarily control a procedural statute." J.T. v. O'Rourke ex rel. Tenth Jud. Dist., 651 P.2d 407, 410 n.2 (Colo. 1982).

436. **Peremptory Challenges (Criminal)**: Conn. Gen. Stat. Ann. § 54-82g (West 2023); Conn. Super. Ct. R. § 5-12. **Source of Rulemaking Authority**: Conn. Gen. Stat. Ann. § 51-14(a) (West 2023); In re Dattilo, 72 A.2d 50, 52 (Conn. 1950) ("Apart from legislative authority, courts acting in the exercise of common-law powers have an inherent right to make rules governing procedure in them."). **Washington-Style Reform**: See Connecticut statute and case law governing courts' rulemaking authority cited above. **Elimination**: While the recent adoption of a Washington-style reform fits within Connecticut's embrace of "concurrent legislative authority" over aspects of criminal procedure, see Bartholomew v. Schweizer, 587 A.2d 1014, 1018 (Conn. 1991), a statute sets forth the number of peremptory strikes in criminal cases, making elimination through rulemaking a tougher lift. Conn. Gen. Stat. Ann. § 54-82g. On the "confusing" state of Connecticut law in this regard, see James F. Sullivan, The Scope of Procedural Rule-Making in Connecticut: Further Confusion in *State v. James* and *Bartholomew v. Schweizer*, 65 Conn. Bar J. 411, 425–26 (1991) (noting the court's "strained and confusing interpretations of procedural statutes in order to reconcile such statutes with the plain meaning of parallel court rules"); see also Peters, supra note 78, at 1554–55 ("In Connecticut, . . . hegemony over court procedures has long been a troublesome issue."). **Judicial Override**: Earlier case law asserted a strong version of judicial supremacy, but the Supreme Court of Connecticut has since deferred to the legislature in many criminal procedure settings. Compare State v. Clemente, 353 A.2d 723, 731 (Conn. 1974) (invalidating a discovery statute), with State v. Rodriguez, 429 A.2d 919, 921 (Conn. 1980) (upholding a statute governing juror qualifications), and State v. Olds, 370 A.2d 969, 976–78 (Conn. 1976) (upholding a statute providing for six-person juries). See also Peters, supra note 78, at 1556–57 (noting a return to the "historical deference of Connecticut courts to legislative authority"); Sullivan, supra, at 425–26 (exploring "confusion" in Connecticut case law).

437. **Peremptory Challenges (Criminal)**: Del. Super. Ct. Crim. R. P. 24. **Source of Rulemaking Authority**: Del. Const. art. IV, § 13(1); Del. Code tit. XI, § 5121(a) (2023). **Washington-Style Reform**: See Delaware Constitution and statute governing courts' rulemaking authority cited above. **Elimination**: Elimination of peremptory strikes would be straightforward because peremptory strikes are a creature of court rule, not statute, in Delaware. See Del. Super. Ct. Crim. R. P. 24. **Judicial Override**: The legislature has recognized that court rules trump conflicting statutes. See Del. Code tit. XI, § 5122 ("Any inconsistency or conflict between any rule of court . . . and any . . . statute of this State, dealing with practice and procedure in criminal actions in the Superior Court, shall be resolved in favor of such rule of court.").

438. **Peremptory Challenges (Criminal)**: Fla. Stat. Ann. § 913.08 (West 2023); Fla. R. Crim. P. 3.350. **Source of Rulemaking Authority**: Fla. Const. art. V, § 2(a). This express constitutional grant of rulemaking authority has made it unnecessary to determine the precise scope of the statutory rulemaking authorization now found at Fla. Stat. Ann. § 25.032 (West 2023) (authorizing rulemaking concerning certified questions "and similar laws"). **Washington-Style Reform**: See Florida constitutional provision governing courts' rulemaking authority cited above. **Elimination**: While a statute (along with a rule) currently fixes the number of peremptory strikes, statutes yield to contrary court rules. See, e.g., Abdool v. Bondi, 141 So. 3d 529, 538 (Fla. 2014) (upholding a statutory amendment in part because it "does not directly change, alter, or abolish any procedural rules of this Court"). **Judicial Override**: The legislature may repeal a procedural rule by a vote of two-thirds of both houses of the legislature. Fla. Const. art. V, § 2(a). Moreover, although a super-majority

may repeal a court rule, this power does not extend to modifying or superseding a procedural rule. See id.; State v. Raymond, 906 So. 2d 1045, 1051 (Fla. 2005) (finding that the legislature overreached in altering the procedural rules governing defendants' pretrial release timing); Johnson v. State, 308 So. 2d 127, 129 (Fla. Dist. Ct. App. 1975) (striking down a statute because it infringed upon the rulemaking power of the Florida Supreme Court), aff'd, 346 So. 2d 66 (Fla. 1977) (per curiam).

439. **Peremptory Challenges (Criminal)**: Ga. Code Ann. § 15-12-165 (2023); Ga. Unif. Super. Ct. R. 11 (referencing time limits on the exercise of peremptory strikes). **Source of Rulemaking Authority**: Ga. Const. art. VI, § IX, para. 1; Ga. Code Ann. § 15-2-18. The Supreme Court of Georgia has on occasion also cited an "inherent power" that exists "[e]ven if the legislature had not expressly provided this authority" to engage in rulemaking. Waldrip v. Head, 532 S.E.2d 380, 385 (Ga. 2000). But recently, the court has cast doubt on the breadth of this proposition. See Duke v. State, 829 S.E.2d 348, 358 (Ga. 2019) ("*Waldrip* 'constitutes blatant judicial usurpation of the legislative function, and cannot be considered to be the legitimate exercise of inherent judicial authority.'" (quoting *Waldrip*, 532 S.E.2d at 389 (Carley, J., dissenting))). **Washington-Style Reform**: See Georgia Constitution, statute, and case law governing courts' rulemaking authority cited above. Judicially promulgated rules "shall not take effect until they have been ratified and confirmed by the General Assembly by an Act or resolution thereof." Ga. Code Ann. § 15-2-18(b). **Elimination, Judicial Override**: Peremptory strikes are authorized by statute, "and in case of conflict[,] [the Uniform Rules] must yield to[] Georgia's statutory law." Hendry v. Hendry, 734 S.E.2d 46, 50 n.5 (Ga. 2012).

440. **Peremptory Challenges (Criminal)**: Haw. Rev. Stat. Ann. §§ 635-29, -30 (West 2023); Haw. R. Penal P. 24(b). **Source of Rulemaking Authority**: Haw. Const. art. VI, § 7; Haw. Rev. Stat. Ann. § 602-11 (West 2023); Farmer v. Admin. Dir. of Ct., 11 P.3d 457, 466 (Haw. 2000). **Washington-Style Reform**: See Hawaii Constitution, statutes, and case law governing courts' rulemaking authority cited above. **Elimination**: Although older cases indicate that "the rule of the Hawai'i Supreme Court prevails" when it is "inconsistent with a prior act of the legislature governing the same," State v. Sorino, 117 P.3d 847, 851 (Haw. Ct. App. 2005) (citing Kudlich v. Ciciarelli, 401 P.2d 449, 455 (Haw. 1965)), rev'd on other grounds, 118 P.3d 645 (Haw. 2005), more recent cases adopt the opposite position, see State v. Obrero, 517 P.3d 755, 763 (Haw. 2022) (stating that statutes supersede court rules where there is a conflict and litigants' substantive rights are at stake); Brutsch v. Brutsch, 390 P.3d 1260, 1272 (Haw. 2017) ("We reiterate that there is significant case precedent holding court rules inapplicable where they conflict with legislative mandates."). **Judicial Override**: The Hawaii Supreme Court has adopted an expansive definition of substantive rights, under which it has invalidated rules of procedure that conflict with statutes. It remains unclear, though, whether the statute would trump a court rule if the matter were deemed purely procedural. See, e.g., *Obrero*, 517 P.3d at 763; Bank of Haw. v. Shinn, 200 P.3d 370, 377 (Haw. 2008); In re Doe Child., 17 P.3d 217, 218–19 (Haw. 2001).

441. **Peremptory Challenges (Criminal)**: Idaho Code § 19-2016 (2023); Idaho Crim. R. 24(d). **Source of Rulemaking Authority**: Idaho Const. art. V, §§ 2, 13 (referencing "judicial power" but making no express reference to rulemaking); Idaho Code § 1-212 (2023) ("The inherent power of the Supreme Court to make rules governing procedure in all the courts of Idaho is hereby recognized and confirmed."); R.E.W. Constr. Co. v. Dist. Ct. of the Third Jud. Dist., 400 P.2d 390, 397 (Idaho 1965) (recognizing inherent rulemaking power). **Washington-Style Reform**: See Idaho statute and case law governing courts' rulemaking authority cited above. **Elimination, Judicial Override**: State v. Weigle, 447 P.3d 930, 934 (Idaho 2019) ("If a statutory provision that is procedural in nature is in conflict with the Idaho Criminal Rules, the rules govern.").

442. **Peremptory Challenges (Criminal)**: 725 Ill. Comp. Stat. Ann. 5/115-4(e) (West 2023); Ill. Sup. Ct. R. 434(d). **Source of Rulemaking Authority**: Ill. Const. art. VI, § 16; 735 Ill. Comp. Stat. Ann. 5/1-104 (West 2023); People ex rel. Chi. Bar Ass'n v. Goodman, 8 N.E.2d 941, 944 (Ill. 1937) ("The power to regulate and define the practice of law is a prerogative of the judicial department as one of the three divisions of the government

created by article 3 of our Constitution."). **Washington-Style Reform**: See Illinois Constitution, statute, and case law governing courts' rulemaking authority cited above. **Elimination, Judicial Override**: People v. Walker, 519 N.E.2d 890, 893 (Ill. 1988) ("[W]here such a legislative enactment directly and irreconcilably conflicts with a rule of this court on a matter within the court's authority, the rule will prevail."); People v. Jackson, 371 N.E.2d 602, 606 (Ill. 1977) (invalidating a statute that provided for broader voir dire than that provided for under Rule 234).

443. **Peremptory Challenges (Criminal)**: Ind. Code Ann. §§ 35-37-1-3, -4 (West 2023); Ind. Jury R. 18(a). **Source of Rulemaking Authority**: See Augustine v. First Fed. Sav. & Loan Ass'n of Gary, 384 N.E.2d 1018, 1020 (Ind. 1979) ("The procedural rules and cases decided by this Court take precedence over any conflicting statutes."); State ex rel. Blood v. Gibson Cir. Ct., 157 N.E.2d 475, 477 (Ind. 1959) ("[T]he power to make rules of procedure in Indiana is neither exclusively legislative nor judicial."). **Washington-Style Reform**: See Indiana case law governing courts' rulemaking authority cited above. **Elimination**: In re Pub. L. No. 305 & Pub. L. No. 309 of Ind. Acts of 1975, 334 N.E.2d 659, 662 (Ind. 1975) ("The procedural rules and the cases decided by the courts take precedence over any statute enacted concerning a procedural matter."). **Judicial Override**: *In re Pub. Law No. 305*, 334 N.E.2d at 662; Key v. State, 48 N.E.3d 333, 339 (Ind. Ct. App. 2015) ("It is a fundamental rule of Indiana law that when a procedural statute conflicts with a procedural rule adopted by the supreme court, the [procedural rule] shall take precedence.").

444. **Peremptory Challenges (Criminal)**: Iowa R. Crim. P. 2.18(10). **Source of Rulemaking Authority**: Iowa's constitution assigns responsibility to the legislature to create a "general system of practice" in Iowa courts. Iowa Const. art. V, § 14. But other sources of law recognize some "inherent" power of the judiciary when the legislature has failed to act. See Iowa C.L. Union v. Critelli, 244 N.W.2d 564, 568–69 (Iowa 1976); see also Iowa Code § 602.4201 (2023) (delegating authority to the Iowa Supreme Court). **Washington-Style Reform**: See Iowa Constitution, statute, and case law governing courts' rulemaking authority cited above. A "legislative council" has the authority to delay the effective date of a promulgated rule by up to fourteen months, during which the general assembly can enact a bill that supersedes the provision. Iowa Code §§ 602.4201–.4202. **Elimination**: See the Iowa statute establishing "legislative council" power cited above. **Judicial Override**: That rulemaking power is delegated from the legislature to the judiciary suggests the primacy of the legislature in case of conflict; the statutory delegation of rulemaking authority additionally provides that a bill may "supersede[]" a proposed rule (although is technically silent as to the effect of judicial override of existing statute). Id.

445. **Peremptory Challenges (Criminal)**: Kan. Stat. Ann. § 22-3412 (West 2023). The Kansas Supreme Court has also adopted "Standards Relating to Jury Use and Management" that provide "guidelines" governing the use of strikes. Standards Relating to Jury Use and Management, pt. B at 4 (Kan. 1983), https://www.kscourts.org/kscourts/media/kscourts/rules/standards-relating.pdf?ext=.pdf?r1=rules+relating+to+district+courts&r2=403 [https://perma.cc/9SF4-ZMNC]. **Source of Rulemaking Authority**: Kan. Const. art. III, § 1; Kan. Stat. Ann. § 20-321 (West 2023); State v. Mitchell, 672 P.2d 1, 8 (Kan. 1983) (holding that the "Federal Constitution guarantees the separation of powers to the states under the guaranty clause," which in turn implies broad procedural rulemaking authority vested in the Kansas Supreme Court). **Washington-Style Reform**: See Kansas Constitution, statute, and case law governing courts' rulemaking authority cited above. **Elimination, Judicial Override**: Although peremptory strikes are currently provided for by statute, "[j]ury selection is a part of court procedure[] [and] [a]s such it falls within the ambit of this Court's rulemaking authority." *Mitchell*, 672 P.2d at 9. Under Kansas law, the judiciary "can acquiesce in legislative action in this area of the judicial function," but "when court rules and a statute conflict . . . the court's constitutional mandate must prevail." Id.

446. **Peremptory Challenges (Criminal)**: Ky. Rev. Stat. Ann. § 29A.290 (West 2023) ("The number of peremptory challenges shall be prescribed by the Supreme Court."); Ky. R. Crim. P. 9.40. **Source of Rulemaking Authority**: Ky. Const. § 116. Before the Kentucky Constitution was amended to include section 116 in 1976, the Kentucky Supreme Court

would on occasion "draw upon the reserve of [its] inherent power . . . to carry out the purposes of the Constitution." Burton v. Mayer, 118 S.W.2d 547, 549 (Ky. 1938). **Washington-Style Reform**: See Kentucky Constitution and case law governing courts' rulemaking authority cited above. **Elimination**: Although Ky. Rev. Stat. Ann. § 29A.290 seems to imply the existence of peremptory strikes, court rules generally trump. See Manns v. Commonwealth, 80 S.W.3d 439, 443–44 (Ky. 2002) (explaining that state courts have the power to preempt statutes dealing with court procedure); see also Spencer v. Commonwealth, 2012-CA-000996-MR, 2013 WL 4033897, at *2 (Ky. Ct. App. Aug. 9, 2013) (rejecting the argument that "[t]he number *and existence* of peremptory challenges, if different from the common law, must be established by the General Assembly" (emphasis added)). **Judicial Override**: In cases of direct conflict, the Supreme Court of Kentucky has taken the unusual step of allowing "unconstitutional" statutes modifying criminal procedure to stand, in the interest of "[c]omity[,] . . . deference[,] and respect." See, e.g., Foster v. Overstreet, 905 S.W.2d 504, 506 (Ky. 1995) (internal quotation marks omitted) (quoting O'Bryan v. Hedgespeth, 892 S.W.2d 571, 577 (1995)). Such precedent creates uncertainty regarding how a direct conflict might be resolved here.

447. **Peremptory Challenges (Criminal)**: La. Code Crim. Proc. art. 795 (2023). **Source of Rulemaking Authority**: La. Const. art. V, § 5(a) ("The supreme court has general supervisory jurisdiction over all other courts. It may establish procedural and administrative rules not in conflict with law . . . ."). **Washington-Style Reform**: See Louisiana Constitution governing courts' rulemaking authority cited above. Though the Louisiana Constitution grants it the power, the Louisiana Supreme Court has not promulgated rules of civil or criminal procedure. More problematic is the unusually detailed statutory scheme governing peremptory strikes found at La. Code Crim. Proc. art. 795. Because the Supreme Court's rulemaking power is limited to "rules not in conflict with law," La. Const. art. V, § 5(a), it is unclear whether even a Washington-style reform would be permissible. **Elimination, Judicial Override**: Because the Supreme Court's rulemaking power is limited to "rules not in conflict with law," id., elimination through rulemaking is likely impossible and the legislature could override any rule modifying peremptory strikes.

448. **Peremptory Challenges (Criminal)**: Me. Rev. Stat. Ann. tit. 15, § 1258 (West 2023) ("The Supreme Judicial Court shall by rule provide the manner of exercising all challenges, and the number and order of peremptory challenges."); Me. R. Crim. P. 24. **Source of Rulemaking Authority**: Me. Rev. Stat. Ann. tit. 4, § 9 (West 2023); Cunningham v. Long, 135 A. 198, 199 (Me. 1926) ("[T]he Supreme Judicial Court may establish, and cause to be recorded, rules not repugnant to law, respecting the modes of trial and conduct of business in suits at law and in equity."). **Washington-Style Reform**: See Maine statute and case law governing courts' rulemaking authority cited above. **Elimination**: The Supreme Judicial Court's rules currently govern peremptory challenges, and in any event, "there can be no doubt of [the Supreme Judicial Court's] power to override any procedural statutes that might be in conflict with [its] rules." Eaton v. State, 302 A.2d 588, 592 (Me. 1973). **Judicial Override**: While a statute overrides a contrary court rule on "substantive matters," peremptory challenges have traditionally been governed exclusively by court rule, and the Supreme Judicial Court has claimed broad inherent authority in jury-related matters. See State v. Schofield, 895 A.2d 927, 937 (Me. 2005) ("Although state law does not specifically provide for a jury trial on sentencing facts, our recognition of such a procedure is well within our inherent judicial power to 'safeguard and protect . . . the fundamental principles of government vouchsafed to us by the State and Federal Constitutions.'" (quoting Morris v. Goss, 83 A.2d 556, 565 (Me. 1951))).

449. **Peremptory Challenges (Criminal)**: Md. Code Ann., Cts. & Jud. Proc. § 8-420 (West 2023); Md. R. 4-313. **Source of Rulemaking Authority**: Md. Const. art. IV, § 18 ("The Supreme Court of Maryland . . . shall adopt rules and regulations concerning the practice and procedure in and the administration of the appellate . . . [and] other courts . . . which shall have the force of law until rescinded, changed or modified by the Supreme Court of Maryland or otherwise by law."). **Washington-Style Reform**: See Maryland Constitution governing courts' rulemaking authority cited above. **Elimination**: A rule adopted by the

Supreme Court of Maryland generally applies despite a prior statute to the contrary and until a subsequent statute repeals or modifies the rule. See Johnson v. Swann, 550 A.2d 703, 705 (Md. 1988) ("The Maryland Rules of Procedure generally apply despite a prior statute to the contrary and until a subsequent statute would repeal or modify the rule."); Simpson v. Consol. Constr. Servs., 795 A.2d 754, 763–66 (Md. Ct. Spec. App. 2002). **Judicial Override**: The Maryland Constitution plainly contemplates the legislative abrogation of a judicial rule, Md. Const. art. IV, § 18, but a Rule of Procedure "generally appl[ies] despite a prior statute to the contrary." *Swann*, 550 A.2d at 705. The result is a last-in-time regime of concurrent authority, which leaves uncertain how a full-blown conflict might be resolved.

450. **Peremptory Challenges (Criminal)**: Mass. R. Crim. P. 20(c). **Source of Rulemaking Authority**: Mass. Const. art. XXX (providing that "the judicial [branch] shall never exercise legislative . . . powers"); Mass. Gen. Laws Ann. ch. 213, § 3 (West 2023) (allowing the courts to "make and promulgate uniform codes of rules" to regulate court practice "in cases not expressly provided for by law"); Op. of the Justs. to the Senate, 376 N.E.2d 810, 822 (Mass. 1978). **Washington-Style Reform**: See Massachusetts Constitution, statute, and case law governing courts' rulemaking authority cited above. **Elimination**: In the absence of any statutory provision governing peremptory strikes, the judiciary's authority to eliminate strikes via court rule is straightforward. See Mass. Gen. Laws Ann. ch. 213, § 3 (giving courts authority to promulgate rules regulating court practice unless otherwise provided for in legislation). **Judicial Override**: Case law is limited. The statutory grant of authority is limited to rules "consistent with law," but some authority suggests that judicial rules take precedence over statutes. See, e.g., *Op. of the Justs.*, 376 N.E.2d at 822 ("[I]f the judicial department promulgates a rule imposing standards higher than or in conflict with those imposed by the legislation, the judicial rule would prevail.").

451. **Peremptory Challenges (Criminal)**: Mich. Comp. Laws Ann. §§ 768.12–.13 (West 2023); Mich. Ct. R. 6.412(E). **Source of Rulemaking Authority**: Mich. Const. art. VI, § 5; Mich. Comp. Laws Ann. § 600.223 (West 2023). Interpreting the Michigan Constitution of 1908, the Michigan Supreme Court held, "It cannot be disputed that this Court has inherent as well as constitutional rulemaking power in the discharge of its general superintending control over all inferior courts." Tomlinson v. Tomlinson, 61 N.W.2d 102, 103 (Mich. 1953). Invocations of this "inherent" power are absent in more recent majority opinions. But see People v. Watkins, 758 N.W.2d 267, 269 (Mich. 2008) (Cavanagh, J., dissenting) (citing *Tomlinson* approvingly). **Washington-Style Reform**: See Michigan Constitution, statute, and case law governing courts' rulemaking authority cited above. **Elimination**: People v. Watkins, 818 N.W.2d 296, 309 (Mich. 2012) (explaining that procedural rules prevail over conflicting statutes). **Judicial Override**: See id.; see also Mich. Ct. R. 1.104 (suggesting that supreme court rules supersede contrary statutes).

452. **Peremptory Challenges (Criminal)**: Minn. R. Crim. P. 26.02(6), (7). **Source of Rulemaking Authority**: Minn. Stat. § 480.059 (2023); State v. Willis, 332 N.W.2d 180, 184 (Minn. 1983) (acknowledging "that the judicial function constitutionally empowers the courts to make their own rules of procedure"). **Washington-Style Reform**: See Minnesota statute and case law governing courts' rulemaking authority cited above. **Elimination**: Even if a statute allocated peremptory strikes, a judicial rule would supersede it. State v. Johnson, 514 N.W.2d 551, 554 (Minn. 1994). **Judicial Override**: The statutory rulemaking authority provides that most statutes (exceptions are listed) "shall . . . be of no force and effect" once a superseding rule is promulgated, Minn. Stat. § 480.059(7), while simultaneously reserving the legislature's right to "modify or repeal" any rule with which it disagrees, id. § 480.059(8). The Supreme Court of Minnesota, however, has held that this purported reservation is unconstitutional. See *Johnson*, 514 N.W.2d at 553–54.

453. **Peremptory Challenges (Criminal)**: Miss. Code Ann. § 99-17-3 (2023); Miss. R. Crim. P. 18.3(c). **Source of Rulemaking Authority**: Newell v. State, 308 So. 2d 71, 76 (Miss. 1975) ("The inherent power of this Court to promulgate procedural rules emanates from the fundamental constitutional concept of the separation of powers and the vesting of judicial powers in the courts."). The Mississippi Supreme Court has effectively ignored the legislature's statutory authorization for rulemaking, claiming broader inherent

constitutional power than the legislature purported to delegate. See Miss. Code Ann. § 9-3-69 (2023); Southwick, supra note 401, at 2 (detailing how the Mississippi Supreme Court has amassed judicial rulemaking power "without legislative involvement"). **Washington-Style Reform**: See Mississippi statute and case law governing courts' rulemaking authority cited above. **Elimination, Judicial Override**: State v. Delaney, 52 So. 3d 348, 351 (Miss. 2011) (explaining that statutes conflicting with court rules are void); see also Southwick, supra note 401, at 2 (discussing the judiciary's aggressive assertion of rulemaking authority).

454. **Peremptory Challenges (Criminal)**: Mo. Ann. Stat. § 494.480 (West 2023). **Source of Rulemaking Authority**: Mo. Const. art. V, § 5 (authorizing rulemaking but prohibiting "rules [that] change . . . the law relating to . . . juries [or] the right of trial by jury"). **Washington-Style Reform, Elimination**: The Missouri Constitution prohibits rulemaking "relating to . . . juries." Id. **Judicial Override**: See id. ("The [court's] rules shall not change substantive rights, or the law relating to . . . juries . . . . Any rule may be annulled or amended in whole or in part by a law limited to the purpose.").

455. **Peremptory Challenges (Criminal)**: Mont. Code Ann. § 46-16-116 (West 2023). **Source of Rulemaking Authority**: Mont. Const. art. VII, § 2(3). The supreme court's statutory basis for its rulemaking authority—Mont. Code Ann. § 3-2-701 (West 2024)—was "impliedly repealed" by this constitutional provision. Coate v. Omholt, 662 P.2d 591, 600 (Mont. 1983). **Washington-Style Reform**: Although the Montana Supreme Court has never promulgated a comprehensive set of rules of criminal procedure, the authority exists pursuant to the Montana Constitution, which vests the state's supreme court with procedural rulemaking authority over "all other courts." See Mont. Const. art. VII, § 2(3). But such rules are "subject to disapproval by the legislature in either of the two sessions following promulgation." Id.; see also In re Formation of E. Branch Irrigation Dist., 186 P.3d 1266, 1267–68 (Mont. 2008) (discussing the "legislative veto" of court rules). **Elimination**: Existing statutory provision notwithstanding, the Montana Supreme Court has held that its rules supersede conflicting statutes. See *In re Formation*, 186 P.3d at 1268. **Judicial Override**: The Montana legislature may exercise a "veto" over court rules; as in Florida, however, "once a legislative veto is exercised, the legislature is not empowered to fill the vacuum by enacting its own legislation governing appellate procedure or lower court procedure." Id. at 1267 (internal quotation marks omitted) (quoting *Coate*, 662 P.2d at 600).

456. **Peremptory Challenges (Criminal)**: Neb. Rev. Stat. § 29-2005 (2023). **Source of Rulemaking Authority**: Neb. Const. art. V, § 25 ("[T]he supreme court may promulgate rules of practice and procedure for all courts, uniform as to each class of courts, and not in conflict with laws governing such matters."). **Washington-Style Reform**: See Nebraska constitutional provision governing the state supreme court's rulemaking authority cited above. **Elimination**: The existence of a statutory provision fixing the number of peremptory strikes precludes elimination by judicial rulemaking. See Peck v. Dunlevey, 172 N.W.2d 613, 615–16 (Neb. 1969) (discussing the rejection of unrestricted judicial rulemaking authority during the state's constitutional convention of 1920). **Judicial Override**: Legislative statutes trump conflicting court rules. Neb. Const. art. V, § 25; *Peck*, 172 N.W.2d at 615–16.

457. **Peremptory Challenges (Criminal)**: Nev. Rev. Stat. Ann. § 175-051 (West 2023); Nev. R. Crim. P. 17(5). **Source of Rulemaking Authority**: Nev. Rev. Stat. Ann. § 2-120 (West 2023); Goldberg v. Eighth Jud. Dist. Ct., 572 P.2d 521, 522–23 (Nev. 1977) (discussing inherent power); see also Nev. Sup. Ct. R., Historical Note Concerning the Supplemental Rules of the Supreme Court of Nevada, https://www.leg.state.nv.us/courtrules/scr.html [https://perma.cc/D8VH-S52P] (last visited Jan. 9, 2024) ("One of the inherent powers of the supreme court, existing independently of statute, is the right . . . to prescribe rules, not inconsistent with law, for its own government . . . ."); Lyft, Inc. v. Eighth Jud. Dist. Ct., 501 P.3d 994, 999 (Nev. 2021) (noting the court's inherent power to prescribe rules necessary to ensure the functioning of the courts). **Washington-Style Reform**: See Nevada statute and case law governing courts' rulemaking authority cited above. **Elimination**: The Nevada Supreme Court possesses inherent power to prescribe rules of procedure. See *Lyft*, 501 P.3d at 999. In the procedural realm, a rule supersedes a conflicting statute. See id. **Judicial Override**: The Nevada legislature "may not enact a procedural statute that conflicts with a

pre-existing procedural rule, without violating the doctrine of separation of powers, and . . . such a statute is of no effect." Id. at 999 (alteration in original) (internal quotation marks omitted) (quoting *State v. Connery*, 661 P.2d 1298, 1300 (Nev. 1983)).

458. **Peremptory Challenges (Criminal)**: N.H. Rev. Stat. Ann. §§ 606:3–:4 (2023); N.H. R. Crim. P. 22(d). **Source of Rulemaking Authority**: N.H. Const. pt. II, art. 73-a; N.H. Rev. Stat. Ann. §§ 490:4, 491:10 (2023); Nassif Realty Corp. v. Nat'l Fire Ins. Co. of Hartford, 220 A.2d 748, 749 (N.H. 1966) (claiming "broad," "comprehensive," and "ancient" inherent rulemaking authority). **Washington-Style Reform**: See New Hampshire Constitution, statute, and case law governing courts' rulemaking authority cited above. **Elimination**: The statutory provision likely serves as a bar to elimination through rulemaking because "the statute trumps the rule" unless such a statute "compromises the core adjudicatory functions of the judiciary." State v. Carter, 106 A.3d 1165, 1171 (N.H. 2014) (resolving "any residual tension" between a rule and a statute governing pretrial discovery in favor of the statute). **Judicial Override**: Id. at 1172 ("In sum, just as the legislature possesses the power to enact laws that override this court's common law and statutory construction precedents . . . so also do its statutory enactments prevail over conflicting court rules, unless those enactments compromise the core adjudicatory functions of the judiciary.").

459. **Peremptory Challenges (Criminal)**: N.J. Stat. Ann. § 2B:23-13 (West 2023); N.J. Ct. R. 1:8-3(d). **Source of Rulemaking Authority**: N.J. Const. art. VI, § 2(3) (announcing that the state's high court should "make rules governing the administration of all courts" and, "subject to the law, the practice and procedure in all such courts"). **Washington-Style Reform**: See New Jersey constitutional provision governing courts' rulemaking authority cited above. **Elimination, Judicial Override**: The Supreme Court of New Jersey has long claimed robust rulemaking authority, including the authority to promulgate procedural rules that trump conflicting existing or future statutes. See State v. Leonardis, 375 A.2d 607, 614 (N.J. 1977) (interpreting the state constitution "to give the Court exclusive and plenary power over rules which are procedural in nature" in a case affirming the judiciary's control over pretrial diversion programs via rulemaking); Winberry v. Salisbury, 74 A.2d 406, 414 (N.J. 1950) ("[T]he rule-making power of the Supreme Court is not subject to overriding legislation, but . . . it is confined to practice, procedure and administration as such.").

460. **Peremptory Challenges (Criminal)**: N.M. Stat. Ann. § 38-5-14 (2023); N.M. Dist. Ct. R. Crim. P. 5-606(D). **Source of Rulemaking Authority**: N.M. Const. art. VI, § 3; N.M. Stat. Ann. § 38-1-1; see also Ammerman v. Hubbard Broad., Inc., 551 P.2d 1354, 1358 (N.M. 1976) (interpreting article VI, section 3, as providing the "inherent power to regulate pleading, practice and procedure affecting the judicial branch" (internal quotation marks omitted) (quoting State ex rel. Anaya v. McBride, 539 P.2d 1006, 1008 (N.M. 1975))). **Washington-Style Reform**: See New Mexico Constitution, statute, and case law governing courts' rulemaking authority cited above. **Elimination, Judicial Override**: Sw. Cmty. Health Servs. v. Smith, 755 P.2d 40, 42 (N.M. 1988) ("[A]ny conflict between court rules and statutes that relate to procedure [is] today resolved by this Court in favor of the rules."); *State ex rel. Anaya*, 539 P.2d at 1008–09 (ruling that the legislature has no power to prescribe rules of practice and procedure and any attempts to do so will be void).

461. **Peremptory Challenges (Criminal)**: N.Y. Crim. Proc. Law § 270.25 (McKinney 2023). **Source of Rulemaking Authority**: N.Y. Const. art. VI, § 30 (authorizing legislature to delegate its rulemaking authority, should it choose to do so, though any rules must be "consistent with the general practice and procedure as provided by statute or general rules"); N.Y. Jud. Law § 211 (McKinney 2023); see also Cohn v. Borchard Affiliations, 250 N.E.2d 690, 695 (N.Y. 1969) ("[T]he language of the Constitution leaves little room for doubt that the authority to regulate practice and procedure in the courts lies principally with the Legislature."). **Washington-Style Reform, Elimination, Judicial Override**: See New York Constitution, statute, and case law governing courts' rulemaking authority cited above. The judiciary has engaged only in minimal rulemaking touching upon criminal procedure, see N.Y. Ct. R. §§ 200–221.3, and express authority to develop such rules has not been delegated by the legislature, as would be required by N.Y. Const. art. VI, § 30.

462. **Peremptory Challenges (Criminal)**: N.C. Gen. Stat. § 15A-1217 (2023). **Source of Rulemaking Authority**: N.C. Const. art. IV, § 13(2); N.C. Gen. Stat. § 7A-34 (2023) (delegating authority to promulgate rules "supplementary to, and not inconsistent with, acts of the General Assembly"). **Washington-Style Reform**: See North Carolina Constitution and statute governing courts' rulemaking authority cited above. **Elimination**: The statutory allocation of peremptory strikes likely precludes elimination through rulemaking. See N.C. Gen. Stat. § 7A-34 (requiring court rules to be "[]consistent with . . . acts of the General Assembly"); State v. Rorie, 500 S.E.2d 77, 79 (N.C. 1998) (recognizing the validity of the legislature's statutory restriction of courts' rulemaking authority), superseded by statute on other grounds, Act of May 8, 2001, ch. 81, secs. 1, 3, 2001 N.C. Sess. Laws 163, 163–65. **Judicial Override**: *Rorie*, 500 S.E.2d at 79; see also State v. Campbell, 188 S.E.2d 558, 559 (N.C. Ct. App. 1972) ("The General Assembly [has] the final word on rules of procedure and practice in the trial courts of our State.").

463. **Peremptory Challenges (Criminal)**: N.D. Cent. Code § 29-17-30 (2023); N.D. R. Crim. P. 24(b)(2). **Source of Rulemaking Authority**: N.D. Const. art. VI, § 3 (granting "authority to promulgate rules of procedure" without limitation and authority to promulgate rules governing attorney practice "unless otherwise provided by law"); N.D. Cent. Code §§ 27-02-08 to -09 (2023); see also State v. Hanson, 558 N.W.2d 611, 615 (N.D. 1996) ("Under [N.D. Const. art. VI, § 3], a procedural rule adopted by this court must prevail in a conflict with a statutory procedural rule."). **Washington-Style Reform**: See North Dakota Constitution, statutes, and case law governing courts' rulemaking authority cited above. **Elimination**: A North Dakota statute provides that previous legislative enactments must yield to subsequently enacted rules. See N.D. Cent. Code § 27-02-09 ("All statutes relating to pleadings, practice, and procedure in civil or criminal actions, remedies, or proceedings, enacted by the legislative assembly, have force and effect only as rules of court and remain in effect unless and until amended or otherwise altered by rules promulgated by the supreme court."); see also N.D. R. Crim. P. 59 (noting that rules promulgated by the supreme court supersede any statute that conflicts with them). **Judicial Override**: Courts regard subsequently enacted statutes designed to repeal or modify court rules as invalid. See State v. Brown, 771 N.W.2d 267, 279 (N.D. 2009); City of Fargo v. Ruether, 490 N.W.2d 481, 483 (N.D. 1992).

464. **Peremptory Challenges (Criminal)**: Ohio Rev. Code Ann. § 2945.21 (2023); Ohio Crim. R. 24(D). **Source of Rulemaking Authority**: Ohio Const. art. IV, § 5(B) ("The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right . . . [and] shall take effect on the following first day of July, unless . . . the general assembly adopts a concurrent resolution of disapproval [beforehand]."). **Washington-Style Reform**: See Ohio constitutional provision governing courts' rulemaking authority cited above. **Elimination**: While rules altering the number, method, and rules pertaining to the exercise of peremptory strikes are likely "procedural" (and, hence, within the scope of the judiciary's rulemaking authority), the basic right to exercise peremptory strikes is "substantive," suggesting an attempt to eliminate them altogether would be impermissible. See State v. Greer, 530 N.E.2d 382, 395 (Ohio 1988). **Judicial Override**: A rule trumps an inconsistent procedural statute. See, e.g., State v. Brown, 528 N.E.2d 523, 530 (Ohio 1988) (holding court rule, not statute, controls the number of grand jurors); see also Ohio Const. art. IV, § 5(B). A rule even invalidates a "subsequently enacted statute[] purporting to govern procedural matters." Hiatt v. S. Health Facilities, Inc., 626 N.E.2d 71, 72 (Ohio 1994). But the "legislative veto" built into the Ohio Constitution means the legislature could block any reforms from going into effect in the first instance, provided a concurrent resolution of disapproval is passed within the required timeframe. Ohio Const. art. IV, § 5(B).

465. **Peremptory Challenges (Criminal)**: Okla. Stat. tit. 22, § 655 (2023). **Source of Rulemaking Authority**: Okla. Stat. tit. 12, § 74 (2023); Eberle v. Dyer Constr. Co., 598 P.2d 1189, 1192–93 (Okla. 1979) (interpreting Okla. Const. art. VII, § 6 as providing the court with rulemaking power so long as the rules do not conflict with the constitution or a statute); see also Okla. Stat. tit. 20, §§ 23, 24 (2023). **Washington-Style Reform**: See Oklahoma

statutes and case law governing courts' rulemaking authority cited above. There also appears to be statutory (and implied constitutional) authority for rulemaking akin to Washington's G.R. 37. See Okla. Stat. tit. 12, § 74; *Eberle*, 598 P.2d at 1192–93. But the Oklahoma Supreme Court has not previously engaged in rulemaking governing criminal procedure and historically has undertaken rulemaking in particular areas chiefly when prompted to do so by the legislature. See, e.g., Okla. Stat. tit. 20, § 25 (directing the promulgation of rules to promote "transparency of the judicial selection process"); Okla. Stat. tit. 12, § 990A(C) (directing the Supreme Court to promulgate rules governing aspects of appellate procedure). **Elimination, Judicial Override**: While in some older cases the Supreme Court of Oklahoma invalidated statutes that sought to "supplant exercise of sound judicial discretion," Puckett v. Cook, 586 P.2d 721, 723 (Okla. 1978), the judiciary's rulemaking power is generally understood to be limited to rules "required to carry into effect the provisions of [the Oklahoma] Code, and . . . consistent therewith." Okla. Stat. tit. 12, § 74. The court has also shown a historical unwillingness to pass rules inconsistent with existing statute. See Keel v. Wright, 890 P.2d 1351, 1354 (Okla. 1995) ("We decline to readopt a rule similar to the pre-1991 Rule 1.11(d) in light of current legislation contrary to such a rule.").

466. **Peremptory Challenges (Criminal)**: Or. Rev. Stat. § 136.230 (West 2023). **Source of Rulemaking Authority**: While the legislature has expressly authorized judicial rulemaking with respect to rules of civil procedure, see Or. Rev. Stat. §§ 1.002, .735 (West 2023), it has not done so with respect to rules of criminal procedure. **Washington-Style Reform, Elimination, Judicial Override**: See Oregon statutes governing courts' rulemaking authority cited above.

467. **Peremptory Challenges (Criminal)**: 234 Pa. Stat. and Cons. Stat. Ann. § 634 (West 2023). **Source of Rulemaking Authority**: Pa. Const. art. V, § 10(c) ("The Supreme Court shall have the power to prescribe general rules governing practice, procedure . . . if such rules . . . neither abridge, enlarge nor modify the substantive rights of any litigant . . . . All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions."); see also In re 42 Pa. C. S. § 1703, 394 A.2d 444, 447 (Pa. 1978) ("[T]he Source of that authority [to engage in rulemaking], after 1968 [when the Judiciary Article of the state constitution was amended], is unquestionably the Constitution."). **Washington-Style Reform**: See Pennsylvania Constitution and case law governing courts' rulemaking authority cited above. **Elimination**: The Supreme Court of Pennsylvania has held that "the right to trial by jury is not a 'substantive right,' but a right of procedure through which rights conferred by substantive law are enforced," and has struck down statutes related to the jury as an unconstitutional encroachment on its authority, even in the absence of a direct conflict with an existing rule. Commonwealth v. McMullen, 961 A.2d 842, 847–48 (Pa. 2008) (internal quotation marks omitted) (quoting Commonwealth v. Sorrell, 456 A.2d 1326, 1329 (1982)). **Judicial Override**: Pa. Const. art. V, § 10(c) ("All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.").

468. **Peremptory Challenges (Criminal)**: R.I. Super. Ct. R. Crim. P. 24(b). **Source of Rulemaking Authority**: 8 R.I. Gen. Laws §§ 8-6-2, -4 (2023). **Washington-Style Reform**: See Rhode Island statute governing courts' rulemaking authority cited above. **Elimination**: The absence of any statutory provision governing peremptory strikes makes the possibility of elimination straightforward. **Judicial Override**: Judicial rules "have the force and effect of a statute and supersede any statutory regulations with which they conflict." State v. Pacheco, 481 A.2d 1009, 1019 (R.I. 1984).

469. **Peremptory Challenges (Criminal)**: S.C. Code Ann. §§ 14-7-1110, -9-200 (2023); S.C. R. Crim. P. 132. **Source of Rulemaking Authority**: S.C. Const. art. V, §§ 4, 4A (authorizing a supermajority of the legislature to veto a proposed rule); S.C. Code Ann. § 14-3-640 ("The court may establish and promulgate such rules and regulations as may be necessary to carry into effect the provisions of this article and to facilitate the work of the court."). **Washington-Style Reform**: See South Carolina Constitution and statute governing courts' rulemaking authority cited above. A 1985 amendment to the South Carolina Constitution provides that the legislature may block the promulgation of a court rule if, within ninety days of submission, "three-fifths of the members of each House present and voting" disapprove of the provision. S.C. Const. art. V, § 4A. **Elimination**: The judicial

rulemaking power is "[s]ubject to the statutory law," id.; the supreme court has recognized the relevant constitutional clause as "establish[ing] the intent to subordinate to the General Assembly the Court's rulemaking power in regard to practice and procedure." Stokes v. Denmark Emergency Med. Servs., 433 S.E.2d 850, 852 (S.C. 1993). **Judicial Override**: See *Stokes*, 433 S.E.2d at 852 (holding that a subsequently enacted statute trumps a rule).

470. **Peremptory Challenges (Criminal)**: S.D. Codified Laws § 23A-20-20 (2023). **Source of Rulemaking Authority**: S.D. Const. art. V, § 12 ("The Supreme Court shall have general superintending powers over all courts and may make rules of practice and procedure and rules governing the administration of all courts. . . . These rules may be changed by the Legislature."); S.D. Codified Laws §§ 16-3-2 to -3 (2023) ("The Supreme Court of South Dakota has power to make all rules of practice and procedure which it shall deem necessary for the administration of justice in all civil and criminal actions . . . ."); City of Sioux Falls v. Ewoldt, 568 N.W.2d 764, 768 n.5 (S.D. 1997) ("This Court has inherent power to regulate procedure in the courts of this state."). **Washington-Style Reform**: See South Dakota Constitution, statutes, and case law governing courts' rulemaking authority cited above. **Elimination**: Under South Dakota law, the judiciary can literally amend (or repeal) an existing statute by court rule. See, e.g., In re Repeal of SDCL 15-39-59, Rule 00-6 (S.D. Mar. 10, 2000), https://ujs.sd.gov/uploads/sc/rules/00-6.pdf [https://perma.cc/328S-L3YL] (repealing civil procedure statute governing removal of civil claims from magistrate court for jury trial); In re Amendment of SDCL 23A-20-26, Rule 97-40 (S.D. Mar. 17, 1997), http://ujs.sd.gov/uploads/sc/rules/97-40.pdf [https://perma.cc/M3AW-NJWQ] (amending statute governing peremptory strikes in civil cases). The judiciary's unusual legislative power suggests that elimination by rulemaking is a possibility in South Dakota notwithstanding a statutory provision governing peremptory strikes. See S.D. Codified Laws § 23A-20-20. **Judicial Override**: While case law is sparse, South Dakota appears to have a last-in-time regime: A court rule may amend or repeal a statute, as discussed above, but article V, section 12, of the South Dakota Constitution provides that judicial rules "may be changed by the Legislature." This framework leaves uncertain how a full-blown conflict between the judiciary and legislature might eventually be resolved.

471. **Peremptory Challenges (Criminal)**: Tenn. Code Ann. § 40-18-118 (2023); Tenn. R. Crim. P. 24(e). **Source of Rulemaking Authority**: Tenn. Code Ann. § 16-3-402 to -408 (2023); Corum v. Holston Health & Rehab. Ctr., 104 S.W.3d 451, 454 (Tenn. 2003) ("[I]t is well settled that the Tennessee Supreme Court has the inherent power to promulgate rules governing the practice and procedure of the courts of this state."). **Washington-Style Reform, Elimination, Judicial Override**: Tennessee appears to be unique insofar as both its constitution and state law recognize judicial rulemaking authority, but no proposed rule can take effect absent affirmative approval by a majority of both houses of the legislature. See Tenn. Code Ann. § 16-3-404. It is therefore not a jurisdiction where the judiciary, acting alone, can effect any change in the law of the jury.

472. **Peremptory Challenges (Criminal)**: Tex. Code Crim. Proc. Ann. art. 35.15 (West 2023). **Source of Rulemaking Authority**: Tex. Const. art. V, § 31 (providing that the "Supreme Court shall promulgate rules of civil procedure for all courts not inconsistent with the laws of the state" and that the "legislature may delegate . . . the power to promulgate such other rules as may be prescribed by law or this Constitution"); Eichelberger v. Eichelberger, 582 S.W.2d 395, 398–99 & n.1 (Tex. 1979) ("The inherent powers of a court are those which it may call upon to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity."). The legislature has delegated rulemaking authority only with respect to "rules of posttrial, appellate, and review procedure," Tex. Gov't Code Ann. § 22.108 (West 2023), evidence, id. § 22.109, and electronic filing in capital cases, id. § 22.1095(a), but not criminal procedure. **Washington-Style Reform, Elimination, Judicial Override**: As discussed above, pursuant to article V, section 31, of the Texas Constitution, the legislature may delegate rulemaking authority regarding criminal procedure to the judiciary. Because the legislature has (mainly) declined to do so, the judiciary would be unable to implement any type of reforms to the law of the jury.

473. **Peremptory Challenges (Criminal)**: Utah R. Crim. P. 18(d). **Source of Rulemaking Authority**: Utah Const. art. VIII, § 4 ("The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state . . . . The Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses . . . ."); Utah Code § 78A-3-103 (2023) (containing similar language). **Washington-Style Reform**: See Utah Constitution and statute governing courts' rulemaking authority cited above. **Elimination**: Elimination is straightforward given the absence of any statutory provision governing peremptory strikes; even if such a statute existed, "rules of procedure are not necessarily subordinate to the provisions of state statutes." See Maxfield v. Herbert, 284 P.3d 647, 652 (Utah 2012). **Judicial Override**: The constitutional grant of judicial rulemaking authority (added in 1985) provides that the "Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature." Utah Const. art. VIII, § 4; see also Bell Canyon Acres Homeowners Ass'n v. McLelland, 443 P.3d 1212, 1216–17 (Utah 2019) (requiring, in addition to a two-thirds vote, both a legislative reference to the rule and a clear expression of the legislature's intent to modify the rule).

474. **Peremptory Challenges (Criminal)**: Vt. Stat. Ann. tit. 12, § 1941 (2023); Vt. R. Crim. P. 24. **Source of Rulemaking Authority**: Vt. Const. ch. II, § 37 ("The Supreme Court shall make and promulgate rules governing . . . practice and procedure in civil and criminal cases in all courts. Any rule adopted by the Supreme Court may be revised by the General Assembly."); Vt. Stat. Ann. tit. 12, § 1 (authorizing procedural rulemaking not affecting substantive rights but allowing the legislature to revise, modify, or repeal such rules). **Washington-Style Reform**: See Vermont Constitution and statute governing courts' rulemaking authority cited above. **Elimination**: Although there is a statute codifying peremptory strikes, a procedural rule "supersedes and impliedly repeals" a conflicting statute. See Pabst v. Lathrop, 376 A.2d 49, 50 (Vt. 1977). **Judicial Override**: Using similar language, both the Vermont Constitution and the statutory authorization for rulemaking provide that the General Assembly may revise a court rule with which it disagrees. See Vt. Const. ch. II, § 37; Vt. Stat. Ann. tit. 12, § 1. The statute goes on to provide: "[The General Assembly's] action [in modifying a rule] shall not be abridged, enlarged, or modified by subsequent rule." Vt. Stat. Ann. tit. 12, § 1. This language is conspicuously absent from chapter II, section 37, of the Vermont Constitution, however, and the Vermont Supreme Court has never been called upon to evaluate its constitutionality.

475. **Peremptory Challenges (Criminal)**: Va. Code Ann. § 19.2-262 (2023). **Source of Rulemaking Authority**: Va. Const. art. VI, § 5; Va. Code Ann. § 8.01-3 (2023) ("The Supreme Court . . . may prepare a system of rules for . . . all courts . . . . The General Assembly may . . . modify or annul any [such] rules . . . . In the case of any variance between a rule and a[] [legislative] enactment . . . such variance shall be construed so as to give effect to such enactment."). **Washington-Style Reform**: See Virginia Constitution and statute governing courts' rulemaking authority cited above. Though the Virginia Supreme Court has not engaged in rulemaking regarding peremptory strikes in criminal cases, it has promulgated rules regarding voir dire and challenges for cause. See Va. Sup. Ct. R. 1:21, 3A:14. **Elimination**: A rule eliminating peremptory strikes would conflict with an existing statute. See Va. Code Ann. § 19.2-262. Virginia law provides that "[i]n the case of any variance between a rule and an enactment of the General Assembly such variance shall be construed so as to give effect to such enactment." Va. Code Ann. § 8.01-3(E). **Judicial Override**: See Virginia statutes governing elimination cited above.

476. **Peremptory Challenges (Criminal)**: Wash. Super. Ct. Crim. R. 6.4(e). **Source of Rulemaking Authority**: Wash. Rev. Code Ann. § 2.04.190 (West 2023) ("The supreme court shall have the power to . . . regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all . . . proceedings of whatever nature by the supreme court, superior courts, and district courts of the state."); State v. Templeton, 59 P.3d 632, 641 (Wash. 2002) ("[T]his court acquires its rule-making authority from the Legislature and from its inherent power to prescribe rules of procedure and practice."); State v. Fields, 530 P.2d 284, 285–86 (Wash. 1975) (interpreting Wash.

Const. art. IV, § 1, to supply inherent rulemaking power). **Washington-Style Reform**: See Washington statute and case law governing courts' rulemaking authority cited above. **Elimination, Judicial Override**: Although no statutory provision requires peremptory strikes, section 2.04.200 of the Revised Code of Washington provides that "[w]hen and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force or effect." Wash. Rev. Code Ann. § 2.04.200.

477. **Peremptory Challenges (Criminal)**: W. Va. Code Ann. § 62-3-3 (LexisNexis 2023); W. Va. R. Crim. P. 24(b). **Source of Rulemaking Authority**: W. Va. Const. art. VIII, § 3 ("The court shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the state relating to writs, warrants, process, practice and procedure, which shall have the force and effect of law."); W. Va. Code Ann. § 51-1-4 (LexisNexis 2023) ("The Supreme Court of Appeals may . . . promulgate general rules and regulations governing pleading, practice and procedure in . . . [all] courts of record of this State. All statutes relating to pleading, practice and procedure shall have force and effect . . . unless . . . modified, suspended or annulled by rules promulgated pursuant to . . . this section."); Boggs v. Settle, 145 S.E.2d 446, 452 (W. Va. 1965) (explaining that this statutory provision simply reiterates the court's inherent power). **Washington-Style Reform**: See West Virginia Constitution, statute, and case law governing courts' rulemaking authority cited above. **Elimination**: While West Virginia currently has a statute allocating peremptory strikes, such statutes "shall have force and effect only as rules of court and shall remain in effect unless and until modified, suspended or annulled by rules promulgated pursuant to the provisions of this section." W. Va. Code Ann. § 51-1-4; see also State v. Arbaugh, 595 S.E.2d 289, 293 (W. Va. 2004) ("[W]e have long recognized that our judicially promulgated rules of practice are constitutionally based and supersede any conflicting statutory provisions."). **Judicial Override**: West Virginia's Supreme Court of Appeals has made clear that it views "the West Virginia Rules of Criminal Procedure [as] the paramount authority controlling criminal proceedings before the circuit courts of this jurisdiction; any statutory or common-law procedural rule that conflicts with these Rules is presumptively without force or effect." *Arbaugh*, 595 S.E.2d at 293 (alteration in original) (internal quotation marks omitted) (quoting State v. Wallace, 517 S.E.2d 20, 21 (W. Va. 1999) (case syllabus)); see also In re Mann, 154 S.E.2d 860, 864 (W. Va. 1967) (holding that the legislature cannot abridge the rulemaking authority of the courts).

478. **Peremptory Challenges (Criminal)**: Wis. Stat. & Ann. § 972.03 (2023). **Source of Rulemaking Authority**: Wis. Stat. & Ann. § 751.12 (2023) ("The state supreme court shall, by rules . . . , regulate . . . procedure . . . in all courts . . . . All statutes relating to . . . procedure may be modified or suspended by [such] rules . . . . This section shall not abridge the right of the legislature to enact, modify, or repeal statutes or rules relating to pleading, practice, or procedure."). **Washington-Style Reform**: See Wisconsin statute governing courts' rulemaking authority cited above. **Elimination**: Provided the Wisconsin Supreme Court holds "a public hearing" regarding the proposal, a rule eliminating peremptory strikes could "modify[] or suspend[]" a conflicting statute. Id. § 751.12(2). **Judicial Override**: Wisconsin's statutory rulemaking scheme expressly allows the Wisconsin Supreme Court to "suspend[]" a conflicting statute by court rule, id., while simultaneously reiterating "the right of the legislature to enact, modify, or repeal statutes or rules relating to pleading, practice, or procedure," id. § 751.12(4). The result is a last-in-time regime where the outcome of any conflict would be uncertain.

479. **Peremptory Challenges (Criminal)**: Wyo. Stat. Ann. § 7-11-103 (2023); Wyo. R. Crim. P. 24(d). **Source of Rulemaking Authority**: Wyo. Stat. Ann. §§ 5-2-114 to -116 (2023); State ex rel. Frederick v. Dist. Ct. of the Fifth Jud. Dist., 399 P.2d 583, 584 n.1 (Wyo. 1965) ("It is well recognized generally and particularly in this jurisdiction that the courts have inherent rights to prescribe rules, being limited only by their reasonableness and conformity to constitutional and legislative enactments."). **Washington-Style Reform**: See Wyoming statutes and case law governing courts' rulemaking authority cited above. **Elimination, Judicial Override**: Once a procedural rule takes effect, "all laws in conflict therewith shall be of no further force or effect." Wyo. Stat. Ann. § 5-2-116.

NOTES

PRIVATE BUSINESS FOR YOUR PRIVATE BUSINESS: EXPANDING BATHROOM ACCESS FOR PEOPLE EXPERIENCING HOMELESSNESS BY BANNING CUSTOMERS-ONLY POLICIES

*Luke Anderson**

For people experiencing homelessness, lack of access to public bathroom facilities often forces the humiliating need to urinate or defecate in public. The bathroom options available to those experiencing homelessness do not meet the population's needs. One solution that scholars and local leaders have proposed is to ban customers-only bathroom policies. Such bans pose difficult legal and political questions. Most significantly, the recent Supreme Court case Cedar Point Nursery v. Hassid*—which expanded takings doctrine and made government regulation of access rights more difficult—creates a complex legal roadblock for local lawmakers seeking to ban customers-only bathrooms. The academics, lawmakers, and activists who have discussed limitations or bans on customers-only bathrooms have yet to address the challenge posed by* Cedar Point.

This Note seeks to fill that gap by analyzing the landscape of takings jurisprudence after Cedar Point. *It reaches two related conclusions. First, banning customers-only bathrooms would likely not be a taking. While* Cedar Point *ostensibly limited a host of access-rights regulations, it carved out several exceptions. Bans on customers-only bathrooms would likely fall into one such exception. The Court's broad holding may thus be less exacting than it appears. Second, regardless of whether these bans are takings, municipal leaders can best serve the public by providing just compensation for the access rights these bans carve out. This solution avoids the indeterminacies of* Cedar Point*, softens the political blow to business owners, and centers the experience and dignity of those living in homelessness.*

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INTRODUCTION

Everyone poops.[1] For most Americans, this is an uncomplicated task. Yet for many, finding a place to use the bathroom is a major struggle.[2] For those experiencing homelessness,[3] lack of access to public bathroom

1. Tarō Gomi, Everyone Poops (Amanda Mayer Stinchecum trans., Chronicle Books 2020) (1977).

2. See, e.g., Kim Corona, How New York City Can Improve Bathroom Access, City & State N.Y. (Dec. 15, 2021), https://www.cityandstateny.com/policy/2021/12/how-new-york-city-can-improve-bathroom-access/359812/ [https://perma.cc/X7KZ-FJ63] ("With just 1,103 public restrooms available to use in the city, . . . New Yorkers continue to struggle in accessing clean and working facilities.").

3. This Note generally uses "people experiencing homelessness" to describe those who lack a "fixed, regular, and adequate nighttime residence." See HUD, The 2022 Annual Homelessness Assessment Report (AHAR) to Congress (pt. 1) 4 (2022), https://www.huduser.gov/portal/sites/default/files/pdf/2022-AHAR-Part-1.pdf [https://perma.cc/7D38-MVFQ]. There is no perfect term to describe this population, so this Note uses the most common term—"homeless"—rather than terms such as "houseless" or "unhoused." See Kayla Robbins, Homeless, Houseless, Unhoused, or Unsheltered: Which Term Is Right?, Invisible People (Aug. 25, 2022), https://invisiblepeople.tv/homeless-houseless-unhoused-

facilities often forces the humiliating need to urinate or defecate in public.[4] This issue has been exacerbated by the COVID-19 pandemic.[5] Many bars and restaurants closed their doors or limited access,[6] and public bathrooms in places such as libraries and subway stations have been slow to reopen after shutting down for social distancing.[7] While some of these spaces are now reopening, COVID-19's longer-term effects on the homeless population will continue to reverberate.[8] Further, recent inflation has supercharged the housing affordability crisis, leading shelter officials in fifteen states to report "a dramatic increase in the number of people, particularly single mothers, seeking services" in 2022.[9]

Homelessness has become an "acute crisis."[10] Unsurprisingly, bathroom access is more strained than ever. In New York City, the closing of bathrooms and the increase in people experiencing homelessness contributed to a near-doubling of public urination complaints during the pandemic.[11] This problem is far more than an inconvenience to the city-dwelling public. For those experiencing homelessness, not having a place to go can result in criminal consequences.[12] And, in the words of one

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or-unsheltered-which-term-is-right/ [https://perma.cc/SVA5-BTM7]. This Note seeks to prioritize the dignity of people experiencing homelessness while keeping in mind that "for housed people who are just looking for a way to help out, policing language isn't the most helpful thing we could be doing." Id.

4. See Corona, supra note 2.

5. See id.

6. See id.

7. See Michelle D. Layser, Edward W. De Barbieri, Andrew J. Greenlee, Tracy A. Kaye & Blaine G. Saito, Mitigating Housing Instability During a Pandemic, 99 Or. L. Rev. 445, 460 (2021) (explaining that some protective measures taken by New York City's Metropolitan Transit Authority have "eliminat[ed] the overnight shelter that some homeless people had come to rely on"); Clio Chang, For a Brief, Beautiful Moment, We Knew Where to Find a Bathroom in the Subway, Curbed (Feb. 17, 2022), https://www.curbed.com/2022/02/open-nyc-subway-mta-bathrooms.html [https://perma.cc/TWW4-SG5Q].

8. Data collection efforts on the number of people experiencing homelessness were interrupted during the pandemic. See State of Homelessness: 2023 Edition, Nat'l All. to End Homelessness, https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness/ [https://perma.cc/2AJW-6AUP] (last visited Sept. 30, 2023). But every indication suggests that "the pandemic has only made the homelessness crisis worse." HUD, HUD Secretary Fudge on 2020 AHAR: Part 1—PIT Estimates of Homelessness in the U.S., YouTube, at 01:23 (Mar. 18, 2021), https://www.youtube.com/watch?v=qACOmm0uMKU (on file with the *Columbia Law Review*).

9. Abha Bhattarai & Rachel Siegel, Inflation Is Making Homelessness Worse, Wash. Post (July 3, 2022), https://www.washingtonpost.com/business/2022/07/03/inflation-homeless-rent-housing/ (on file with the *Columbia Law Review*).

10. See German Lopez, Homeless in America, N.Y. Times: The Morning Newsl. (July 15, 2022), https://www.nytimes.com/2022/07/15/briefing/homelessness-america-housing-crisis.html (on file with the *Columbia Law Review*).

11. Aaron Elstein, No Place to Go, Crain's N.Y. Bus., https://www.crainsnewyork.com/special-features/no-place-go-public-bathrooms-nyc (on file with the *Columbia Law Review*) [hereinafter Elstein, No Place to Go] (last visited Sept. 7, 2023).

12. See infra section I.A.1.

formerly homeless person, "[o]ne of the consequences of public urination for homeless people is humiliation."[13] The criminal and dignitary consequences mean much is at stake for those in need of a place to go. But the bathroom options available to those experiencing homelessness—shelters, public (i.e., municipality-operated) bathrooms, and private bathrooms open to the public (e.g., restaurants and shops)—do not meet the population's needs.[14]

Scholars and local leaders have considered several possible solutions to this problem. Common refrains call for the construction of more public bathrooms and for the decriminalization of public urination and defecation.[15] One potential stopgap solution has been discussed less frequently: banning customers-only bathroom policies.[16] These bans would prevent businesses of public accommodation—such as restaurants, bars, and shops—from restricting bathroom access to paying customers only.[17]

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13. Corona, supra note 2 (internal quotation marks omitted) (quoting Ashley Belcher, an outreach and organizing specialist at a New York City nonprofit).

14. For an excellent analysis of the availability and accessibility of bathrooms for those experiencing homelessness, see Ron S. Hochbaum, Bathrooms as a Homeless Rights Issue, 98 N.C. L. Rev. 205, 218–34 (2020) [hereinafter Hochbaum, Bathrooms and Homeless Rights]. Shelters often are at capacity, and those with availability often close during the daytime. Id. at 219. Further, many experiencing homelessness have valid reasons for avoiding shelters, such as overcrowding; restrictions on possessions, pets, and gender identity; triggers for mental illness; and restrictions on coming and going. See id. Municipality-operated bathrooms are too scarce to serve the public's needs. See id. at 223. Many of these bathrooms are difficult to access due to, among other things, daytime-only hours, maintenance and sanitation issues, inadequate signage, inaccessible or inconvenient location, and closure during particular seasons. See id. at 227–28. Finally, private businesses often use "For Customers Only" bathroom policies, making their bathrooms inconsistently available to those experiencing homelessness. See id. at 219–20.

15. See id. at 249–67. One scholar, Richard M. Weinmeyer, has taken calls for more public bathrooms a step further by arguing for a right to public toilets. See Richard M. Weinmeyer, Lavatories of Democracy: Recognizing a Right to Public Toilets Through International Human Rights and State Constitutional Law, 26 U. Pa. J. Const. L. (forthcoming 2024) (manuscript at 4) (on file with the *Columbia Law Review*) ("This Article is the first of its kind to propose recognizing state constitutional rights to public bathrooms as a comprehensive first step towards addressing the United States' public bathroom crisis."). Others, such as Minneapolis City Council Member Jamal Osman, have called for portable toilets near homeless encampments. See Grace Birnstengel, Is Providing a Portable Toilet an Endorsement of a Homeless Encampment?, MPR News (Feb. 1, 2023), https://www.mprnews.org/story/2023/02/01/is-providing-a-portable-toilet-an-endorsement-of-a-homeless-encampment [https://perma.cc/7S7X-UVPA] (last updated Feb. 3, 2023).

16. See Hochbaum, Bathrooms and Homeless Rights, supra note 14, at 256–58; see also Taunya Lovell Banks, The Disappearing Public Toilet, 50 Seton Hall L. Rev. 1061, 1091 (2020) ("Stronger measures might include requiring all restaurants and bars to make their toilets available to the general public . . . ."); Ron Hochbaum, Opinion, Let's Ban 'For Customers Only' Policies, S.F. Chron. (Apr. 25, 2018), https://www.sfchronicle.com/opinion/openforum/article/Let-s-ban-for-customers-only-policies-12865050.php (on file with the *Columbia Law Review*) [hereinafter Hochbaum, Banning Customers-Only Policies].

17. See Hochbaum, Banning Customers-Only Policies, supra note 16.

While these bans have yet to find success in American cities,[18] they could ease the burden on municipalities and prevent discriminatory exclusion.[19] Scholars—most notably Professor Ron S. Hochbaum—have suggested these bans as a solution to the bathroom-access problem for those experiencing homelessness.[20] Local leaders and community activists have similarly challenged business owners' right to exclude noncustomers from their bathrooms (though these challenges have been either unsuccessful or more limited than outright bans).[21]

Such bans pose difficult legal and political questions. Most significantly, the recent Supreme Court case *Cedar Point Nursery v. Hassid*[22]—which expanded takings doctrine and made government regulation of access rights more difficult[23]—creates a complex legal roadblock for local lawmakers seeking to ban customers-only bathrooms. The academics, lawmakers, and activists who have discussed limitations or bans on customers-only bathrooms have yet to address the challenge posed by *Cedar Point*. This Note fills that gap by analyzing the landscape of post–*Cedar Point* takings jurisprudence. In doing so, it serves two audiences. First, it serves those seeking to better understand *Cedar Point*'s convoluted takings doctrine. By providing an example of the doctrine's application to an actual legal problem, it reveals the indeterminacies of the Court's approach and offers solutions for navigating them. Second, it serves local leaders who seek to alleviate the suffering of those living in homelessness. It lays out a clear pathway for those attempting to take advantage of private bathroom infrastructure by banning customers-only policies.

This Note reaches two related conclusions. First, banning customers-only bathrooms likely would not be a taking.[24] While *Cedar Point* ostensibly limited a host of access-rights regulations, it carved out several exceptions (perhaps to avoid disturbing too much existing legislation).[25] Bans on customers-only bathrooms would likely fall into one such exception. The Court's broad holding may thus be less exacting than it appears.[26] Second, regardless of whether these bans are takings, municipal leaders can best serve the public by providing just compensation for the access rights that the bans may "take."[27] This solution avoids the indeterminacies of *Cedar Point*, softens the political blow to business owners, and centers the

18. See Banks, supra note 16, at 1091 (citing Amsterdam as the only city that has banned customers-only bathrooms).

19. See Hochbaum, Bathrooms and Homeless Rights, supra note 14, at 258–59.

20. See supra notes 14, 16 and accompanying text.

21. See infra section I.B.

22. See 141 S. Ct. 2063 (2021).

23. See infra section II.A.

24. See infra section III.A.

25. See infra notes 205–206 and accompanying text.

26. See infra section III.A.

27. See infra section III.B.

experience and dignity of those living in homelessness. It is also more cost-effective than building municipality-operated bathrooms.[28]

This Note proceeds in three parts. Part I summarizes the adverse, discriminatory effects that customers-only policies have on people experiencing homelessness. It then describes past attempts at banning or limiting customers-only policies, concluding that the time for a ban is ripe. Part II addresses potential problems such bans may encounter if attempted in the future. First, it considers whether banning customers-only bathroom policies would amount to a taking under *Cedar Point*. Then, it discusses policy challenges regarding line drawing and enforcement as well as the potential for political backlash. Part III weighs the challenges of bans against their potential upside and provides guidance for municipal leaders who seek to tap into private-business bathroom infrastructure to increase bathroom access.

I. BACKGROUND: HARM, MOMENTUM, AND STALLED ATTEMPTS

Customers-only bathroom policies have adverse, discriminatory effects on those experiencing homelessness. By excluding the homeless population from using bathrooms operated by private businesses, businesses of public accommodation contribute to the bathroom scarcity for those in need of a place to go.[29] These policies not only lower the total number of available toilets but also tend to exclude noncustomers inconsistently—business owners often discriminate against people on the basis of race, socioeconomic status, gender identity, and other characteristics.[30] This Part addresses the harm done by customers-only bathroom policies. Specifically, it outlines criminal and dignitary harms done to those experiencing homelessness as well as public health harms done to the broader public. It then outlines past attempts at banning or limiting such policies. This Part shows that as people experiencing homelessness are becoming more and more desperate for toilets, proposals to limit business owners' right to exclude are gaining momentum. But this momentum teeters on a knife's edge.

A. *Adverse Effects of Customers-Only Bathrooms*

In April 2018, two Black men—Rashon Nelson and Donte Robinson—were arrested after asking to use the bathroom of a Philadelphia Starbucks.[31] They were waiting to meet a business associate

28. See infra section III.B.

29. See supra note 14.

30. See Banks, supra note 16, at 1067–68.

31. See Matt Stevens, Starbucks C.E.O. Apologizes After Arrests of 2 Black Men, N.Y. Times (Apr. 15, 2018), https://www.nytimes.com/2018/04/15/us/starbucks-philadelphia-black-men-arrest.html (on file with the *Columbia Law Review*); Emily Stewart, Starbucks Says Everyone's a Customer After Philadelphia Bias Incident, Vox (May 19, 2018), https://

and had not yet made a purchase.[32] Starbucks eventually responded to this racist episode by allowing "all guests to use its cafes, including its restrooms, whether or not they make a purchase."[33] Starbucks banned customers-only bathrooms. In the years since Starbucks enacted this policy, research has shown a "decrease in public urination citations near Starbucks locations relative to other areas . . . . By contrast, a wide range of other minor public order crimes show no significant changes or consistent signs of effects."[34] These findings strongly suggest that eliminating customers-only bathroom policies would help serve the bathroom needs of the homeless population.

By refusing to offer up their restrooms to the general public, private businesses decline the opportunity to take part in the solution to the bathroom-access problem. The blame, of course, does not fall squarely on private businesses. As Professor Taunya Lovell Banks argues, "[T]he lack of government operated or sponsored free or low-cost public toilets in urban areas, and their replacement with toilets controlled by private business, creates opportunities to discriminate against people seeking access to those toilets . . . ."[35] Municipalities must not be let off the hook for failing to provide government-operated bathrooms.[36] Still, banning customers-only bathrooms would be the "quickest and most cost-effective way to ameliorate the crisis, while protecting the health and dignity of homeless individuals everywhere."[37]

Reading a "'restrooms for customers only'" sign, "[o]ne really doesn't have to wonder who those signs are directed at," writes Professor John B. Mitchell.[38] Professor Mitchell reflects on the fact that he has, on occasion, "walked past those signs and straight to the washroom."[39] Many middle- and upper-class readers have likely had similar experiences. Those

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www.vox.com/identities/2018/5/19/17372164/starbucks-incident-bias-bathroom-policy-philadelphia [https://perma.cc/XJ8M-RYV9].

32. See Stewart, supra note 31.

33. Julie Jargon, Starbucks Restrooms Open for All Visitors, Wall St. J. (May 19, 2018), https://www.wsj.com/articles/starbucks-creates-policy-on-nonpaying-guests-1526745600 (on file with the *Columbia Law Review*).

34. Umit G. Gurun, Jordan Nickerson & David H. Solomon, Measuring and Improving Stakeholder Welfare Is Easier Said Than Done 4 (Nov. 15, 2021) (unpublished manuscript), https://ssrn.com/abstract=3531171 [https://perma.cc/7HUK-9UT4]. This research also showed that Starbucks's policy change has likely had negative effects on its bottom line. Id. at 7. The potential for adverse effects on businesses is addressed later in this Note. See infra section II.B.2.

35. See Banks, supra note 16, at 1067; see also Weinmeyer, supra note 15 (manuscript at 22) (noting that under current federal civil rights laws, businesses may discriminate based on "economic classifications").

36. Hochbaum, Bathrooms and Homeless Rights, supra note 14, at 253.

37. Hochbaum, Banning Customers-Only Policies, supra note 16.

38. John B. Mitchell, Crimes of Misery and Theories of Punishment, 15 New Crim. L. Rev. 465, 485 (2012).

39. Id.

privileged enough to look like customers are treated as such.[40] Customers-only bathroom policies are meant to specifically exclude the homeless population.[41] And this exclusion translates to severe criminal and dignitary consequences for those experiencing homelessness.[42]

1. *Criminal Consequences.* — When people are left with no choice but to urinate or defecate in public,[43] they become vulnerable to criminal punishment.[44] Many cities list public urination and defecation as prohibited conduct.[45] In some states, people convicted of public urination or defecation may also be required to register as sex offenders.[46] Sex offenders find it very difficult, if not impossible, to obtain housing.[47] "Buffer zones" around schools and parks render some cities almost entirely off limits for registered sex offenders.[48] And lifetime registered offenders are barred from receiving federally funded housing assistance.[49] The homelessness-

40. See id. ("I might be a customer, if not today then another time. Anyway, customer or not, there's class recognition and with it class-based courtesy.").

41. See id.; see also Jeremy Waldron, Homelessness and the Issue of Freedom, 39 UCLA L. Rev. 295, 311 (1991) ("Most homeless people do not have jobs and few of them are allowed inside restaurants.").

42. See Banks, supra note 16, at 1068 (arguing that criminalizing public urination in areas without public toilets is "unconscionable" and that the resulting dignitary effects are severe).

43. See Mitchell, supra note 38, at 485 (describing a hypothetical situation in which a person experiencing homelessness "urinated in public, not to make a symbolic statement or to offend others, but because she desperately had to piss").

44. See Banks, supra note 16, at 1073–74; see also Justin Olson & Scott MacDonald, Washington's War on the Visibly Poor: A Survey of Criminalizing Ordinances & Their Enforcement 3 (Seattle Univ. Sch. of L., Working Paper No. 15-19, 2015), https://ssrn.com/abstract=2602318 [https://perma.cc/ZU9G-TYKQ] (finding that the majority of cities in Washington State criminalize public urination or defecation while failing to "provide sufficient access to 24-hour restrooms and hygiene centers").

45. See Nat'l L. Ctr. on Homelessness & Poverty, Housing Not Handcuffs: Ending the Criminalization of Homelessness in U.S. Cities 47 (2019), https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf [https://perma.cc/7JUE-SST9] [hereinafter Housing Not Handcuffs] ("[Eighty-three percent] of cities prohibit public urination and/or defecation."). While some jurisdictions recognize a "necessity" exemption to public urination offenses, these exemptions "depend heavily on notoriously biased police discretion." See Banks, supra note 16, at 1077.

46. See Housing Not Handcuffs, supra note 45, at 47 ("[I]n some cases, homeless people forced to urinate or defecate in public are also charged with public exposure or public indecency. These may be charged as sex crimes which can come with sex offender registration requirements as well as bans from living in broad areas of many cities."); Banks, supra note 16, at 1073 (citing several public indecency and sex offender statutes to support the claim that some states "require persons convicted of public urination to register as sex offenders").

47. See Rocket Drew, Sentenced to Homelessness: The Case for Housing Sex Offenders, Brown Pol. Rev. (Apr. 20, 2019), https://brownpoliticalreview.org/2019/04/sentenced-homelessness-case-housing-sex-offenders/ [https://perma.cc/K2MY-Y2BE].

48. See id. ("For example, 93% of residential properties in Newark, New Jersey[,] fall within 2500 feet of a school.").

49. Id.

to-incarceration cycle churns on: "[O]ffenders experiencing housing instability are more likely to be in noncompliance with their registry requirements."[50] Public urination and defecation charges are just one of the many examples of governments criminalizing homelessness.[51] Governments, not private businesses, are to be blamed for these harsh laws.[52] Yet private business could play a part in blunting their effects. People experiencing homelessness would be subject to these laws less often if they had sufficient bathroom access—a problem that private businesses have the infrastructure to remedy.[53]

2. *Dignitary Consequences.* — Customers-only bathroom policies contribute not only to criminal consequences for those experiencing homelessness but also to dignitary harms. Having no choice but to relieve oneself in public can be humiliating.[54] Moreover, businesses that enforce customers-only bathroom policies legitimize dignitary hierarchies between those who can and cannot pay for bathrooms (and between employees and those seeking to use the bathroom).[55] And, simply put, relieving oneself outside can be an unpleasant experience.

Already-marginalized groups are especially likely to experience dignitary harm from customers-only bathroom policies. People of color face added layers of dignitary harm, as demonstrated by the Philadelphia Starbucks incident.[56] People who menstruate also face an added layer of dignitary (and health-related) harm because they must manage menstruation without access to basic sanitation.[57] And dignitary harms are

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50. Id.

51. See Hochbaum, Bathrooms and Homeless Rights, supra note 14, at 243–44. Other examples of the criminalization of homelessness include prohibitions on "sitting, lying, and resting in public spaces"; "sleeping, camping, and living in vehicles"; "begging and panhandling"; and "sharing food." Id. at 243; see also Housing Not Handcuffs, supra note 45, at 37 ("[L]aws punishing the life-sustaining conduct of homeless people have increased in every measured category since [2006] . . . .").

52. Engagement with calls to reform laws criminalizing homelessness falls beyond the scope of this Note. For an overview of legal reform options, see Hochbaum, Bathrooms and Homeless Rights, supra note 14, at 259–67.

53. See supra notes 31–37 and accompanying text.

54. See supra note 13 and accompanying text.

55. See Banks, supra note 16, at 1082 ("Most businesses seldom refuse toilet access to 'respectably dressed' middle- or upper-class white people, customers or not. Thus, these members of the policy-making class seldom experience situations where they . . . lack access to a public toilet."); Hochbaum, Bathrooms and Homeless Rights, supra note 14, at 235 ("'Bathrooms for Customers Only' signs are now ubiquitous, and employees have become the gatekeepers.").

56. See supra notes 31–33 and accompanying text; see also Hochbaum, Bathrooms and Homeless Rights, supra note 14, at 258 ("These norms are subjectively and selectively enforced and lead to discrimination as demonstrated by the incident at the Philadelphia Starbucks.").

57. See Hawi Teizazu, Marni Sommer, Caitlin Gruer, David Giffen, Lindsey Davis, Rachel Frumin & Kim Hopper, "Do We Not Bleed?" Sanitation, Menstrual Management,

amplified for transgender people experiencing homelessness, who face the dual challenges of finding a bathroom consistent with their gender identities and finding a bathroom available to the homeless population.[58] Customers-only bathroom policies contribute to the dignitary harms that people experiencing homelessness face every day, and these harms are especially pronounced for already-marginalized groups.

3. *Health, Safety, and Quality of Life.* — Beyond criminal and dignitary consequences for those experiencing homelessness, customers-only bathroom policies contribute to problems with health, safety, and quality of life. First and foremost, when people experiencing homelessness lack access to basic sanitation, they risk health complications.[59] But the public health and quality-of-life concerns extend beyond the homeless population. Failing to properly treat urine and feces subjects the broader public to disease.[60] And finally, public urination and defecation can result in inconvenience and property damage.

B. *Past Attempts to Ban or Limit Customers-Only Bathrooms*

Bathroom access is becoming an increasingly salient issue. The New York City Council recently introduced a bill that "aims to quadruple the

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and Homelessness in the Time of COVID, 41 Colum. J. Gender & L. 208, 216–17 (2021) ("Meeting fundamental needs without shame while in public is critical to human dignity in urban settings. Basic sanitation and menstrual management should be leverage enough, but these are parlous times for public health. The realities of COVID-19 add urgency to provision of [public restrooms] . . . .").

58. See Hochbaum, Bathrooms and Homeless Rights, supra note 14, at 241 ("[T]he provision and design of bathrooms raises issues for transgender and gender nonconforming individuals. The lack of gender-neutral bathrooms leads to harassment of transgender individuals and frequently puts them in harm's way.").

59. See id. at 236–37 ("[U]rine retention can lead to urinary tract infections and renal damage. Delays in defecating can lead to 'constipation, abdominal pain, diverticuli, and hemorrhoids . . . .'" (alteration in original) (footnote omitted) (quoting Memorandum from John B. Miles, Jr., Dir., OSHA Directorate of Compliance Programs, to Reg'l Adm'rs. & State Designees, on Interpretation of 29 C.F.R. § 1910.141(c)(1)(i) (Apr. 6, 1988), https://www.osha.gov/laws-regs/standardinterpretations/1998-04-06-0 [https://perma.cc/8NS7-SH7V])); see also Banks, supra note 16, at 1083 (explaining that "OSHA promulgated rules to require employers to provide their employees with toilet facilities so that they will not suffer the adverse health effects that can result if toilets are not available").

60. See Hochbaum, Bathrooms and Homeless Rights, supra note 14, at 236 ("Exposure to urine and feces can result in the transmission of a number of infectious diseases, including salmonella, shigella, hepatitis, tapeworm, and hookworm."). But see Banks, supra note 16, at 1073 ("[S]ome claim that [the threat of feces to public health] is 'exaggerated' and 'removing refuse—even feces—from the street has much more to do with quality of life than with public health.'" (quoting Laura Norén, Only Dogs Are Free to Pee: New York Cabbies' Search for Civility, *in* Toilet: Public Restrooms and the Politics of Sharing 93, 105 (Harvey Molotch & Laura Norén eds., 2010))). Even if the public health concerns are exaggerated, quality-of-life concerns present a legitimate public interest.

number of public toilets in New York City by 2035."[61] But this bill is just another in a long line of attempts to address "New York City's notorious lack of public restrooms."[62] Historically, these efforts have stalled out.[63] And eleven years is a long time to wait. San Diego has opted for a different strategy—one that homeless advocates have decried.[64] The San Diego City Council recently prioritized a lobbying campaign "to end the state ban on pay toilets."[65] This solution might increase access for tourists, but it would ignore the far-more-pressing needs of people experiencing homelessness, who are less likely to pay for use.[66] And the proposed twenty-five-cent fee wouldn't come close to offsetting the costs of building and operating public bathrooms.[67]

Efforts like these miss a solution hiding in plain sight—the thousands of toilets already existing in shops, cafés, and restaurants.

1. *Outright Bans.* — Banning customers-only bathrooms is a relatively untested idea, at least in the United States.[68] The most notable attempt to ban customers-only bathrooms was made by the Chicago City Council in

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61. Lawmakers Push Effort to Increase Public Toilet Access Across NYC, News 12 Bronx (Aug. 3, 2023), https://bronx.news12.com/lawmakers-push-effort-to-increase-public-toilet-access-across-nyc [https://perma.cc/58PC-FYB6].

62. See Press Release, Mark Levine, Manhattan Borough President, MBP Levine & CM Joseph's Bill for More Public Bathrooms Crosses the Finish Line in Council (Mar. 12, 2023), https://www.manhattanbp.nyc.gov/for-immediate-release-3/ [https://perma.cc/7WGZ-A248].

63. See Theodora Siegel, Opinion, If New York Is So Great, Why Isn't There Anywhere to Pee?, N.Y. Times (Jan. 15, 2023), https://www.nytimes.com/2023/01/15/opinion/new-york-public-toilets.html (on file with the *Columbia Law Review*) (documenting New York City's past efforts to install public toilets). New Yorkers have now taken matters into their own hands. Teddy Siegel, an opera student and New York City resident, "created the TikTok account @got2gonyc to share free NYC bathrooms." See Home, Got2gonyc, https://www.got2gonyc.com [https://perma.cc/3E3E-CQP6] (last visited Sept. 25, 2023); see also Siegel, supra. This TikTok account has grown into a "community of hundreds of thousands of followers" across several social media platforms. Got2gonyc, supra. Siegel's advocacy helped spur the recent bathroom access bill. Id.

64. See Phillip Molnar, Could Pay Toilets Work in Downtown San Diego?, San Diego Union-Trib. (Feb. 10, 2023), https://www.sandiegouniontribune.com/business/story/2023-02-10/could-pay-toilets-work-in-downtown-san-diego [https://perma.cc/ZFZ9-H4Q2] ("Homeless advocates have spoken out against the City Council's move . . . ."). But see Weinmeyer, supra note 15 (manuscript at 54) (arguing that bans on "fee-for-service restrooms operate on an antiquated idea of freedom that no longer makes sense").

65. Molnar, supra note 64.

66. See id. ("[The homeless] population is unlikely to pay for use, and paid alternatives will likely justify neglecting the underlying problem." (internal quotation marks omitted) (quoting Austin Neudecker, employee at Weave Grown Partners, a Silicon Valley investment firm)).

67. See id. ("Even if all 1,939 downtown homeless paid the expected 25-cent fee, only $710,000 would be raised per year. This would cover the maintenance cost of just two toilets." (internal quotation marks omitted) (quoting economist Lynn Reaser)).

68. See Banks, supra note 16, at 1091 (citing Amsterdam as the only city that has banned customers-only bathrooms).

2017.[69] The proposed ordinance provided that "[a]ny licensee that provides public toilet facilities to its customers must allow individuals who have an emergency and need to use the toilet facilities to do so without having to make a purchase. Furthermore, a fee cannot be charged for the use of the toilet facilities under these circumstances."[70] This proposal, championed by Alderman David Moore, ultimately failed to pass[71] due to pressure from city officials.[72]

More recently, the New York City Council "revised the plumbing code in a way that could force more businesses to make their restrooms available to most everyone."[73] In December 2019, "the New York City Council unanimously voted to adopt Local Law 14 of 2020, to bring the New York City Plumbing Code up to date with 2015 edition of the International Plumbing Code."[74] In reference to bathrooms provided by private businesses, this revision to the Plumbing Code states, "*The public* shall have access to the required toilet facilities at all times that the building is occupied."[75] The term "[t]he public" replaced the phrase "[e]mployees,

69. See Proposed Ordinance for Amendment of Municipal Code Chapter 4-4 by Adding New Section 4-4-340 Requiring Licensed Establishments to Allow Non-Patrons to Use Public Toilet Facilities for Emergency Purposes (Chi., Ill. introduced Apr. 19, 2017), https://occprodstoragev1.blob.core.usgovcloudapi.net/lsmatterattachmentspublic/4c89c8f3-9ae6-440b-ab11-663d241781c3.pdf [https://perma.cc/96U4-PK35] [hereinafter Proposed Chicago Bathroom Ordinance]; see also Hochbaum, Bathrooms and Homeless Rights, supra note 14, at 256–57 (discussing the Chicago City Council's effort to pass a ban on customers-only policies).

70. Proposed Chicago Bathroom Ordinance, supra note 69; see also Hochbaum, Bathrooms and Homeless Rights, supra note 14, at 256–57.

71. See Matter Details for Record Number O2017-3200, Off. of the City Clerk Anna M. Valencia City of Chi. (May 19, 2017), https://chicityclerkelms.chicago.gov/Matter/?matterId=C062D614-E10D-ED11-82E3-001DD80693B4 [https://perma.cc/572H-UDXS].

72. City officials told Alderman Moore that "there was already a regulation ordering businesses to let people walk in and go to the toilet." John Byrne, Alderman's Plan to Make Restaurants Open Their Restrooms to Non-Customers Stalls, Chi. Trib. (July 19, 2017), https://www.chicagotribune.com/politics/ct-chicago-business-bathroom-public-access-met-20170719-story.html [https://perma.cc/U2PX-Y2K3]. Apparently, these officials were referring to Illinois's Ally's Law, which requires businesses to open their bathrooms to people with certain medical conditions. See Hochbaum, Bathrooms and Homeless Rights, supra note 14, at 257. Ally's Laws are discussed further in section I.B.2, infra. "A plain reading of the ordinance reveals significant differences" between Alderman Moore's plan and Ally's Laws. Hochbaum, Bathrooms and Homeless Rights, supra note 14, at 256–57. One wonders whether this pressure stemmed from political concerns rather than from a fear of adding a redundant law to the books.

73. Elstein, No Place to Go, supra note 11.

74. Code Revision: Recent Activity, N.Y.C. Dep't of Bldgs., https://www.nyc.gov/site/buildings/codes/code-revisions.page [https://perma.cc/X34B-HZWZ] (last visited Oct. 25, 2022).

75. N.Y.C., N.Y., Local Law No. 14, § 403.3.1 (Jan. 10, 2020), https://www.nyc.gov/assets/buildings/local_laws/ll14of2020.pdf [https://perma.cc/CEP3-GSKV] (emphasis added).

customers, patrons and visitors."[76] Some, including a former assistant commissioner at the Department of Buildings, thought this change might allow a mayoral administration to interpret the Code as requiring businesses to open their bathrooms to the general public.[77] Despite that possibility, Mayor Eric Adams's administration declined to read the Code as limiting customers-only bathrooms.[78] Department of Buildings spokesperson Andrew Rudansky made clear that the "'change in the plumbing code does not mean that most businesses have to open their bathrooms to passersby'" but rather was meant to reflect "the latest thinking from the International Code Council, which said the intent of the revision is for businesses to 'serve only the people involved with the activities of the establishment.'"[79]

This amendment to the Plumbing Code never amounted to an attempt at banning customers-only bathrooms. Still, local businesspeople's dismayed reaction to the prospect of a ban[80] may be instructive for lawmakers seeking to make such a change in the future. When it appeared that the Code change might ban customers-only bathrooms, one business leader responded, "If a business wants to provide access to their restroom voluntarily, that's great, but the government should not start mandating this and should instead build public toilets around the city."[81]

To date, calls to ban customers-only bathrooms have remained mostly theoretical.[82] Though outright bans have yet to gain traction, attempts at limiting customers-only bathroom policies have found success. Two examples—Ally's Laws and a New York City law providing bathroom access for delivery workers—may provide a template for future bans.

2. *Limiting Customers-Only Bathrooms: Ally's Laws and Delivery Workers.* — Some state laws already limit business owners' right to exclude people from their bathrooms. Many states have laws known as "Restroom Access Acts" or "Ally's Laws," which "require businesses to open employee

76. Id.

77. Elstein, No Place to Go, supra note 11.

78. Aaron Elstein, City Won't Force Restaurants to Open Restrooms to the Public, Crain's N.Y. Bus. (Mar. 21, 2022), https://www.crainsnewyork.com/hospitality-tourism/new-york-city-wont-force-restaurants-open-restrooms-public (on file with the *Columbia Law Review*) [hereinafter Elstein, City Won't Force Restaurants].

79. Id. (first quoting Rudansky; then quoting Int'l Code Council, International Plumbing Code § 403.3 (3d printing ed. 2015), https://codes.iccsafe.org/s/IPC2015_NY/chapter-4-fixtures-faucets-and-fixture-fittings/IPC2015-Ch04-Sec403.3 [https://perma.cc/EH9R-569R]).

80. According to reporter Aaron Elstein, "When informed of the looming code change, business owners were appalled." Elstein, No Place to Go, supra note 11.

81. Id. This same New Yorker called a potential ban of customers-only bathrooms an "additional burden" on small businesses. Elstein, City Won't Force Restaurants, supra note 78.

82. See supra notes 16–19 and accompanying text (describing academic calls to ban customers-only bathrooms but a lack of traction in American cities).

bathrooms to members of the public with eligible medical conditions."[83] Such medical conditions typically include "Crohn's disease, ulcerative colitis, any other inflammatory bowel disease, irritable bowel syndrome, or any other medical condition that requires immediate access to a toilet facility."[84] These laws typically require that the person seeking bathroom access provides some kind of proof of medical condition, such as a doctor's note.[85] A more robust ban on customers-only bathroom policies would differ in scope—but not necessarily in kind—from Ally's Laws. An exception for individuals with eligible conditions is only narrower in scope (applying to those with more urgent needs) than bans applying to the general public. The two policies are similar in kind in that they both would limit business owners' right to exclude people with legitimate needs for bathroom access. The fact that one can "hold it" longer than a person with Crohn's disease does not make their eventual need any less legitimate. If one waits long enough, the very fact of being human becomes a "condition that requires immediate access to a toilet facility."[86] And for those experiencing homelessness, reaching that point in a public setting is only a matter of time.

A more recent development in bathroom access was a New York City amendment that was "sparked by . . . the demands of Los Deliveristas Unidos, a labor group representing thousands of delivery workers."[87] This

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83. Hochbaum, Bathrooms and Homeless Rights, supra note 14, at 255–56; see also Weinmeyer, supra note 15 (manuscript at 25) ("Restroom access acts . . . have been enacted in nineteen states and the District of Columbia and grant emergency entrance to a business's employee restrooms should there be no public restroom available in the vicinity.").

84. Tenn. Code Ann. § 68-15-303(b)(2) (2022); see also Hochbaum, Bathrooms and Homeless Rights, supra note 14, at 255–56. Under most Ally's Laws, businesses that refuse to provide bathroom access to eligible individuals are subject to fines. Hochbaum, Bathrooms and Homeless Rights, supra note 14, at 256; see also, e.g., 410 Ill. Comp. Stat. Ann. 39/20 (West 2022) (establishing a fine of "not more than $100"); Wis. Stat. & Ann. § 146.29(5)(a) (2022) (establishing a fine of "not more than $200"). For a sampling of other state Ally's Laws, see, e.g., Colo. Rev. Stat. § 25-41-101 (2023); Conn. Gen. Stat. Ann. § 19a-106a (West 2022); Del. Code tit. 16, §§ 3001H–3006H (2023); Md. Code Ann., Health-Gen. § 24-209 (West 2023); Mass. Gen. Laws Ann. ch. 270, § 26 (West 2023); Minn. Stat. § 325E.60 (2022); Tex. Health & Safety Code Ann. § 341.069 (West 2023). Unfortunately, Ally's Laws "appear to be largely ineffective in terms of enforcement." Weinmeyer, supra note 15 (manuscript at 25–26). For more on enforcement problems and solutions, see infra section II.B.1; infra notes 239–240 and accompanying text.

85. See Hochbaum, Bathrooms and Homeless Rights, supra note 14, at 256. In the United Kingdom, disabled people can request or purchase something called a "RADAR key" from many local government authorities. See Helen Dolphin, RADAR Keys Explained: What Are They, Where Can I Use Them and How Do I Get One?, Motability (Nov. 15, 2022), https://news.motability.co.uk/everyday-tips/radar-keys-explained-what-are-they-where-can-i-use-them-and-how-do-i-get-one/ [https://perma.cc/988F-NQB5]. These keys can be used to access locked, accessible toilets in many public and commercial establishments, which prevents the humiliating need to request bathroom access or provide proof of disability. Id.

86. Tenn. Code Ann. § 68-15-303(b)(2).

87. Claudia Irizarry Aponte, Delivery Workers Cheer Restroom Access and Tip Transparency Alongside AOC and Chuck Schumer, The City (Jan. 23, 2022),

amendment to section 20-563.6(b) of the New York City Administrative Code[88] requires that third-party delivery apps (such as Grubhub and DoorDash) "[h]ave written agreements with restaurants" that "must contain a provision requiring the restaurant to allow bathroom access to delivery workers."[89] Importantly, this law functions quite differently from Ally's Laws in that it requires third-party apps to contract for bathroom access with other businesses as a licensing condition.[90] It is not a direct imposition of bathroom access by the government on restaurants. Still, this law indicates growing support for limitations on business owners' right to exclude people from bathrooms.

This growing support offers lawmakers a window of opportunity to ban customers-only bathrooms. But this window will not last forever. Starbucks is already reconsidering its open-bathrooms policy, and some locations have begun to limit access again.[91] Starbucks CEO Howard Schultz has framed this reconsideration as a safety concern,[92] though fear of damage to the company's bottom line is likely a factor as well.[93] Starbucks has provided a valuable service to the public and especially to

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https://www.thecity.nyc/work/2022/1/23/22898143/delivery-workers-restroom-access-aoc-schumer [https://perma.cc/E2Q9-JRP8]; see also N.Y.C., N.Y., Local Law No. 117 (Oct. 25, 2021), https://legistar.council.nyc.gov/View.ashx?M=F&ID=10437960&GUID=F273405C-CF72-4586-B7C9-96553047045D [https://perma.cc/CNB4-L8ZV].

88. N.Y.C., N.Y., Admin. Code § 20-563.6 (2022).

89. Press Release, N.Y.C. Dep't of Consumer & Worker Prot., Mayor Adams, Department of Consumer and Worker Protection Announce New Protections for Food Delivery Workers (Apr. 21, 2022), https://www1.nyc.gov/site/dca/media/pr042122-Adams-DCWP-New-Protections-for-Food-Delivery-Workers.page [https://perma.cc/6MMG-H2LG].

90. N.Y.C., N.Y., Admin. Code §§ 20-563.1–.2, .6(b).

91. See Lauren Aratani, Starbucks Under Pressure to Keep Restrooms Open to Public, The Guardian (Nov. 18, 2022), https://www.theguardian.com/business/2022/nov/18/starbucks-under-pressure-restrooms-open-public [https://perma.cc/8XQH-W8YN] ("'Let the people go!' an activist group is telling Starbucks after the coffee chain's boss threatened to close down its bathrooms.").

92. See id. (noting that "[w]hile Schultz did not specify what problems the business has been having with its open-restroom policy, Schultz said the company has to 'harden our stores and provide safety for our people'" (quoting N.Y. Times Events, Starbucks's C.E.O. Howard Schultz on Unions, China, Mental Health and Bathrooms, YouTube, at 20:31 (June 10, 2022), https://www.youtube.com/watch?v=FUxpuhci9qI&t=1234s (on file with the *Columbia Law Review*))). In some cases, safety concerns may be valid. But these concerns largely fall outside the scope of this Note. To the degree that those in crisis pose a threat to others, they are not necessarily more dangerous inside a bathroom than on the sidewalk or the train. Addressing safety concerns (both for those living in homelessness and for the broader public) is important work that requires proactive and lasting solutions to the broader problem of homelessness and its many complex causes. For a survey of research on homelessness and an especially helpful overview of research on "housing first" policies, see Brendan O'Flaherty, Homelessness Research: A Guide for Economists (and Friends), 44 J. Hous. Econ. 1, 2–3 (2019).

93. See Gurun et al., supra note 34, at 4 (finding that Starbucks's policy change may have driven away some paying customers).

those experiencing homelessness, but it has done so largely on its own.[94] Starbucks's efforts must be bolstered by spreading the burden of bathroom provision across similar places of public accommodation. Lawmakers must act quickly to capitalize on recent momentum before the window of opportunity passes. If local leaders don't press forward, they may well be forced backward.

II. CAUSES FOR CONCERN

The drafting of the New York City amendment for delivery workers likely avoids any confrontation with *Cedar Point Nursery v. Hassid* because the municipality does not directly carve out any access right from private businesses.[95] Bans on customers-only bathrooms, however, may be more susceptible to a *Cedar Point* challenge. Further, these bans could run into political and practical problems that may cause headaches for lawmakers. Part II problematizes bans on customers-only bathrooms while pointing toward potential solutions, which Part III further fleshes out.

A. Cedar Point *and Access Rights*

In *Cedar Point*, the Supreme Court held that a California regulation—which provided a "right to take access" to an agricultural employer's property for up to three hours per day, 120 days per year[96]—was a "*per se* physical taking under the Fifth and Fourteenth Amendments."[97] The Takings Clause of the Fifth Amendment prohibits the taking of private property "for public use, without just compensation."[98] Some takings, such

94. See Christopher Bonanos, Outsourcing Public Bathrooms to Starbucks Maybe Wasn't the Best Idea, Curbed (June 10, 2022), https://www.curbed.com/2022/06/starbucks-closing-public-restrooms-toilets-locked-schultz.html [https://perma.cc/C2CN-2ZWL] ("You can, if you are cross-eyed and cross-legged with desperation, despoil the corner of a building or subway station, risking a summons. Or you can do what most of us do, which is find a Starbucks.").

95. See 141 S. Ct. 2063, 2080 (2021) ("The access regulation grants labor organizations a right to invade the growers' property. It therefore constitutes a *per se* physical taking."). Even if the New York amendment were read to carve out an access right from restaurants, it would still likely pass through a *Cedar Point* analysis unscathed because governments "may require property owners to cede a right of access as a condition of receiving certain benefits . . . such as a permit, license, or registration." Id. at 2079. In this case, conditioning the licensure of third-party food delivery apps (and with the licensure, the benefit that restaurants receive from these services) on bathroom access would likely fall under this exception. For more detail on the standards for showing that a regulation is not a taking because it is a condition of a government benefit, see infra text accompanying notes 194–196.

96. Cal. Code Regs. tit. 8, § 20900 (2021).

97. *Cedar Point*, 141 S. Ct. at 2069, 2080; see also U.S. Const. amends. V, XIV.

98. U.S. Const. amend. V. The Takings Clause applies to the states through the Fourteenth Amendment. See, e.g., *Cedar Point*, 141 S. Ct. at 2071.

as the condemnation of land for infrastructure projects, are clear-cut.[99] Others are more subtle and involve regulations under a state's police power that go "too far" in interfering with a property owner's rights.[100] Suspect regulations are subject to the balancing test laid out in *Penn Central Transportation Co. v. City of New York* to determine whether the regulation amounts to a taking (and thus whether the government must pay just compensation).[101] Though regulations that may go "too far" are subject to the *Penn Central* test, "a permanent physical occupation of property is a taking" per se.[102] Per se takings are not subject to *Penn Central*'s balancing test,[103] which is quite permissive toward government regulation.[104]

In *Cedar Point*, the Court expanded the realm of per se takings to include the granting of an ongoing access right[105]—even one that can be exercised only intermittently.[106] In its decision, the Court emphasized the importance of a property owner's "right to exclude," calling it "'one of the most treasured' rights of property ownership."[107] "We cannot agree," the Court reasoned, "that the right to exclude is an empty formality, subject to modification at the government's pleasure."[108] At first glance, *Cedar Point* looks fatal to attempts at banning customers-only bathrooms.[109] Such bans

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99. See *Cedar Point*, 141 S. Ct. at 2071 ("[P]hysical appropriations constitute the 'clearest sort of taking,' and we assess them using a simple, *per se* rule: The government must pay for what it takes." (citation omitted) (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001))).

100. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."); see also *Cedar Point*, 141 S. Ct. at 2072 ("Our cases have often described use restrictions that go 'too far' as 'regulatory takings.'").

101. See 438 U.S. 104, 124 (1978) ("In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance."). When conducting a *Penn Central* analysis, courts weigh factors "such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

102. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

103. See *Cedar Point*, 141 S. Ct. at 2072 ("Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place.").

104. See Thomas W. Merrill & Henry E. Smith, The Oxford Introductions to U.S. Law: Property 255 (Dennis Patterson ed., 2010) (noting that the *Penn Central* test "has generally been fatal to regulatory takings claims").

105. See *Cedar Point*, 141 S. Ct. at 2079–80 ("None of these considerations undermine our determination that the access regulation here gives rise to a *per se* physical taking. Unlike a mere trespass, the regulation grants a formal entitlement to physically invade the growers' land.").

106. See id. at 2075 ("[W]e have recognized that physical invasions constitute takings even if they are intermittent as opposed to continuous.").

107. Id. at 2072 (quoting *Loretto*, 458 U.S. at 435).

108. Id. at 2077.

109. Or, rather, fatal to *uncompensated* bans on customers-only bathrooms. See infra section III.A.

would modify a business owner's "right to exclude," creating an access right for members of the public who need to use the bathroom.

The Court, however, carved out three exceptions to the general rule that an ongoing access right is a per se taking. First, "[i]solated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right."[110] Second, "many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights."[111] Among the "background restrictions" the Court cited were "traditional common law privileges to access private property" such as the doctrines of "public or private necessity."[112] And finally, "the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking."[113] Relying on this conditioning-benefits exception, the Court reasoned that "government health and safety inspection regimes will generally not constitute takings."[114]

Aside from these three exceptions, the *Cedar Point* Court also made sure to distinguish its decision from *PruneYard Shopping Center v. Robins*.[115] In that case, the Court reviewed a decision from the California Supreme Court that "held that the State Constitution protected the right to engage in leafleting at the PruneYard, a privately owned shopping center."[116] The question before the Court was whether this protection amounted to a taking by going "too far" in its regulation of the shopping center's right to exclude the leaflet distributors.[117] The Court conducted a *Penn Central* balancing test and determined that while there had been a literal "taking" of "the right to exclude others," it did not go "too far."[118] In *Cedar Point*, the Court distinguished its holding from *PruneYard* on the ground that "the PruneYard was open to the public, welcoming some 25,000 patrons a day."[119] Importantly, the Court stressed that "[l]imitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade

110. *Cedar Point*, 141 S. Ct. at 2078.

111. Id. at 2079.

112. See id.

113. Id.

114. Id.

115. 447 U.S. 74 (1980); see also Abigail K. Flanigan, Note, Rent Regulations After *Cedar Point*, 123 Colum. L. Rev. 475, 496 (2023) ("By distinguishing a previous Supreme Court precedent, *Pruneyard Shopping Center v. Robins*, the Court also implicitly introduced a fourth exception." (footnote omitted)).

116. *Cedar Point*, 141 S. Ct. at 2076 (citing *PruneYard*, 447 U.S. at 78).

117. See *PruneYard*, 447 U.S. at 82–83.

118. Id. at 82–85.

119. *Cedar Point*, 141 S. Ct. at 2076 (citing *PruneYard*, 447 U.S. at 77–78).

property closed to the public."[120] Thus, the extent to which the public already has access to a given property may determine whether a per se taking has occurred. While bans on customers-only bathrooms would apply to businesses that are "generally open to the public," the specific area in question—the bathroom—has traditionally been subject to more stringent exclusions. These bans lie somewhere between the holdings of *Cedar Point* and *PruneYard*.[121]

Given the recent judicial zeal for protecting the "right to exclude," bans on customers-only bathrooms may face an uphill battle. To avoid a takings challenge, lawmakers must either situate bans within one of the three exceptions outlined above or frame their case as more like *PruneYard* than *Cedar Point*. Part III lays out a roadmap for lawmakers looking to chart a path through *Cedar Point*'s hazy doctrine. But first, a few more potential problems.

B. *Practical and Political Problems*

Aside from the potential for takings litigation, bans on customers-only bathrooms are likely to raise other issues. Practically, these bans would need to deal with line-drawing and enforcement challenges. And, as the New York City amendment to the Plumbing Code demonstrated, political backlash from business owners is possible (and perhaps likely).[122] This section addresses these problems.

1. *Line Drawing and Enforcement.* — Which businesses would bans apply to? This presents a difficult line-drawing question for lawmakers. Generally, these bans could apply to businesses offering goods or services to customers on a walk-in basis. But banning customers-only bathrooms in all businesses of public accommodation[123] might be overinclusive. After all, "property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property."[124] For some businesses of public accommodation, bans would be more disruptive

120. Id. at 2077; see also Horne v. Dep't of Agric., 576 U.S. 351, 364 (2015) ("[I]n *PruneYard* . . . we held that a law limiting a property owner's right to exclude certain speakers from an *already publicly accessible* shopping center did not take the owner's property." (emphasis added)).

121. See infra note 214 and accompanying text for an analysis of the relevant property unit for *PruneYard* purposes.

122. See supra notes 80–81 and accompanying text.

123. See Hochbaum, Banning Customers-Only Policies, supra note 16 (pointing to "businesses of public accommodation, such as restaurants," as places with the existing bathroom infrastructure to meet the needs of the homeless population); see also, e.g., Protections in Places of Public Accommodation Under the New York State Human Rights Law, N.Y. State Div. of Hum. Rts., https://dhr.ny.gov/protections-places-public-accommodation-under-new-york-state-human-rights-law [https://perma.cc/VH7C-4Q8N] (last visited Sept. 25, 2023) (describing places of public accommodation as including, but not limited to, health clinics, hotels, movie theaters, restaurants and bars, and retail stores).

124. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982).

of expectations regarding property rights. For example, a restaurant that consistently fills up its nightly slate of reservations would find its expectations deeply unsettled by a ban on customers-only bathrooms. On the other hand, some businesses might already allow the general public to use their bathrooms, by either formal policy[125] or informal practice.[126] Takings questions aside, lawmakers will likely want to maintain some level of stability in their constituents' expectations. Determining who's in and who's out—and sufficiently defining these categories for the sake of clear legislation—will prove difficult. Lawmakers could address these challenges by restricting the class of affected businesses. Municipalities might already have zoning classifications or other statutes that could help define the relevant subgroup of businesses. If not, laws banning customers-only bathrooms could include exemptions. For example, statutory language could exempt establishments that require reservations.[127]

Enforcing these bans also presents a challenge. Most Ally's Laws contain provisions for fining noncompliant businesses.[128] Such a provision might work for outright bans on customers-only bathroom policies, but the greater potential for pushback might make enforcement less straightforward. Making matters more complicated, those who would stand to benefit most from the bans—people experiencing homelessness—may be among the least likely to learn about changes in municipal policy.[129] These bans' intended beneficiaries would likely struggle to enforce their rights given the discrimination they already face. Business owners might generally comply with the bans but press their luck with people who are visibly

125. See supra notes 31–33 and accompanying text (describing Starbucks's policy of allowing noncustomers to use café bathrooms).

126. See supra notes 38–40 and accompanying text (describing how customers-only policies are informally directed only at those who do not look like customers).

127. See infra section III.B for further discussion on restricting the affected class of businesses. Absent preexisting definitions, subgroups of businesses could be defined by statute. This language could be borrowed from other jurisdictions. For example, New York City's Administrative Code defines a "fast food establishment" as:

> [A]ny establishment (i) that has as its primary purpose serving food or drink items; (ii) where patrons order or select items and pay before eating and such items may be consumed on the premises, taken out or delivered to the customer's location; (iii) that offers limited service; (iv) that is part of a chain; and (v) that is one of 30 or more establishments nationally . . . .

N.Y.C., N.Y., Admin. Code § 20-1201 (2022).

128. See supra note 84.

129. Cf. Leonie Milder, Digital Exclusion of the Homeless in America: COVID-19's Impact, Diggit Mag. (Sept. 4, 2021), https://www.diggitmagazine.com/articles/digital-exclusion-homeless-america-covid-19s-impact [https://perma.cc/AX5K-J3HG] ("Many [people experiencing homelessness] are not, or barely, able to access or use digital media in order to enjoy the countless possibilities they have to offer.").

homeless or those presenting with symptoms of mental illness.[130] Moreover, many people experiencing homelessness have grown accustomed to the law working against them, making them less likely to seek out legal recourse.[131]

2. *Political Backlash.* — Along with practical policymaking problems, business owners are likely to react negatively to bans on customers-only bathrooms.[132] They may have some reason to react with skepticism. Research on Starbucks's change in bathroom policy indicates that the "policy had a direct effect that was costly to Starbucks, particularly in locations closer to homeless shelters."[133] After implementing the change, Starbucks locations saw a decrease in both customer volume and the duration of customer visits relative to other coffee shops.[134] Importantly, however, this research studied the effects of just one company's change in bathroom policy.[135] The beauty of an across-the-board ban on customers-only bathrooms lies in its potential for burden spreading.[136] Business owners may counter that "providing access to public bathrooms is the responsibility of government and not private business."[137] Lawmakers must be prepared to respond to these concerns with reassurance, leadership, and a commitment to being a part of the solution.

Lawmakers who hope to ban customers-only bathroom policies have their work cut out for them. Part III provides guidance for addressing the legal, political, and practical concerns over banning customers-only bathrooms.

III. CHARTING A PATH FORWARD

A ban on customers-only bathrooms must successfully navigate the challenges of *Cedar Point* while dealing with practical and political roadblocks. Municipal leaders should carefully weigh the upside of such bans against their political and legal risks. Further, lawmakers must avoid making bathroom access *someone else's problem*. Rather, local governments should work alongside local businesses to care for people experiencing homelessness.

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130. See supra notes 38–42 and accompanying text (describing the discriminatory application of bathroom policies).

131. The author worked as a case manager at a homeless shelter during the COVID-19 pandemic. Several of his clients reported feeling "jerked around" (and similar sentiments) by the government and legal institutions.

132. See supra notes 80–81 and accompanying text.

133. Gurun et al., supra note 34, at 4.

134. See id. at 3.

135. See id. at 1.

136. See Hochbaum, Banning Customers-Only Policies, supra note 16 ("[A] law that requires all businesses to open up their bathrooms minimizes the cost for any one business.").

137. Id.; see also supra note 81 and accompanying text.

This Part offers two options for municipal leaders to consider. First, governments could ban customers-only bathroom policies without compensating businesses. This option would require a strong legal defense to potential takings claims under *Cedar Point*. To signal their participation in bathroom access efforts, governments could supplement this policy by building more publicly operated bathrooms. Second, governments could ban customers-only bathrooms *and* compensate businesses for the cost of operating essentially public bathrooms. This route would avoid any potential takings challenges and could assuage political backlash. Ultimately, lawmakers, business owners, and business patrons alike must bear in mind the needs of society's most vulnerable—considering the obligations each person might owe to those in need.[138]

A. *Uncompensated Bans*

Proponents of bans on customers-only bathrooms likely have three arguments that such bans are not per se takings and that "just compensation" is not due under the Fifth Amendment.[139] First, proponents could rely on the doctrines of public and private necessity—two of the "longstanding background restrictions on property rights" carved out in *Cedar Point*.[140] Second, proponents could push for laws that condition certain health and safety benefits on the abolition of customers-only bathroom policies. And third, proponents could stress that bans would apply only to businesses "generally open to the public,"[141] situating these bans as closer to *PruneYard*[142] than to *Cedar Point*. By preemptively guarding against takings challenges, municipalities could save money by avoiding payment of "just compensation."[143] This option might be especially desirable for resource-strapped cities.

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138. Gregory S. Alexander's human flourishing theory of property provides one compelling framework for thinking through the obligations that come with owning property. See Gregory S. Alexander, Ownership and Obligation: The Human Flourishing Theory of Property, 43 H.K. L.J. 451, 458–59 (2013). This framework posits that because human beings depend on one another for human flourishing, property owners owe certain obligations to "support the social networks and structures that enable us to develop those human capabilities that make human flourishing possible." Id. at 458. These obligations are "inherent in the concept of" property ownership. Id. at 453. Under Professor Alexander's theory, the right to exclude is limited by the obligations property owners owe to other members of society, and the state may "be obligated to step in to compel the wealthy to share their surplus with the poor so that the latter can develop the necessary capabilities" for human flourishing. Id. at 452, 458.

139. U.S. Const. amend. V.

140. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2079 (2021).

141. Id. at 2077.

142. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980).

143. U.S. Const. amend. V.

1. *Necessity.* — In *Cedar Point*, the Court carved out exceptions to its broad holding.[144] "[M]any government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights," the Court reasoned.[145] "These background limitations . . . encompass traditional common law privileges to access private property," such as allowing "individuals to enter property in the event of public or private necessity."[146] Municipalities could avoid compensating private businesses for the access right to their bathrooms by situating bans as "consistent with" the "longstanding background restrictions" of private and public necessity.[147]

When the Court referenced public and private necessity, it cited to its 1992 case *Lucas v. South Carolina Coastal Council*[148] as well as the Restatement (Second) of Torts.[149] But the Court did not clarify which formulation of "traditional common law privileges" applies in takings cases.[150] For example, should state courts look to their own common law to determine such privileges or to federal formulations of private property? Or both? Two terms after *Cedar Point*, in *Tyler v. Hennepin County*, the Court clarified that while state law is an important source of property rights, it "cannot be the only source" because "[o]therwise, a State could 'sidestep the Takings Clause by disavowing traditional property interests' in assets it wishes to appropriate."[151] To avoid this dilemma, the Court added "historical practice" and Supreme Court precedent to the list of places to look for "'existing rules or understandings' about property rights."[152]

In *Lucas*, the Court considered whether "background principles of the State's law of property and nuisance already place[d] upon land

144. *Cedar Point*, 141 S. Ct. at 2079.

145. Id.

146. Id. (citing Restatement (Second) of Torts §§ 196–197 (Am. L. Inst. 1964)).

147. See id.

148. See id. (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 n.16 (1992)).

149. See id. (citing Restatement (Second) of Torts §§ 196–197).

150. See id.

151. 143 S. Ct. 1369, 1375 (2023) (quoting Phillips v. Wash. Legal Found., 524 U.S. 156, 167 (1998)).

152. Id. (quoting *Phillips*, 524 U.S. at 164). It's worth pausing for a moment to insist that the Court is still being less than straightforward. The Court drew its rule from *Phillips*, which understandably reasons that "a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized *under state law*." *Phillips*, 524 U.S. at 167 (emphasis added because the Court neglected to finish the sentence in *Tyler*). In *Phillips*, the Court considered state law to be the primary definer of property rights because the federal "Constitution protects rather than creates property interests." Id. at 164. But now, according to *Tyler*, the Court's understanding of "historical practice" not only *protects* property rights but also helps *define* them. See *Tyler*, 143 S. Ct. at 1375–76. And the Court isn't simply concerned with the "historical practice" within the applicable state. Rather, it now looks to characters such as King John's thirteenth-century sheriffs and bailiffs. Id. at 1376. Despite this lack of clarity, litigants should still cite state law as an especially important source of property rights, just like this Note does in notes 164–177 and accompanying text, infra.

ownership" limited the owner's title, suggesting that the doctrine of necessity might similarly apply in takings cases.[153] The Court limited "the relevant category of laws that would satisfy the exception to those that track the common law" and then "remanded the case to the South Carolina courts for a determination of whether the conduct at issue . . . would constitute a nuisance under South Carolina common law."[154] Given that the *Cedar Point* majority drew its concept of "background limitations" in part from *Lucas*, it follows that state law applies when determining what constitutes public and private necessity. Similarly, the Restatement (Second) of Torts draws its doctrine largely from state law.[155] So while the Supreme Court has recently begun to develop its own conception of private property under federal constitutional law,[156] the question of what constitutes public and private necessity should be answered by looking first to state common law.

Proponents of bans on customers-only bathrooms could find one justification for such bans by looking to common law necessity doctrines as formulated by state courts. According to section 197 of the Restatement (Second) of Torts, "[o]ne is privileged to enter or remain on land in the possession of another if it is or reasonably appears to be necessary to prevent serious harm to . . . the actor, or his land or chattels, or . . . the other or a third person, or the land or chattels of either."[157] This is the doctrine of private necessity. While the Restatement imposes potential liability for harm done in the exercise of this privilege, this liability was not particularly relevant to the Court's *Cedar Point* opinion. For the Court, the salient point seems to be that the regulation must simply be grounded in "longstanding background restrictions," one of which is "entry to avert serious harm to a person."[158] In such cases, the government does not owe compensation.[159]

Urination and defecation are, of course, medical necessities.[160] Those without housing and no place to use the bathroom are left with a dire set

153. *Lucas*, 505 U.S. at 1029 & n.16.

154. Thomas W. Merrill, Choice of Law in Takings Cases, 8 Brigham-Kanner Prop. Rts. J. 45, 50 (2019) [hereinafter Merrill, Choice of Law]; see also *Lucas*, 505 U.S. at 1031 ("The question, however, is one of state law to be dealt with on remand.").

155. See *Cedar Point*, 141 S. Ct. at 2079 (citing Restatement (Second) of Torts §§ 196–197 (Am. L. Inst. 1964)); see also Shyamkrishna Balganesh, Relying on Restatements, 122 Colum. L. Rev. 2119, 2120 (2022) (noting that Restatements "initially focused on state common law areas").

156. See supra notes 151–152 and accompanying text; see also Merrill, Choice of Law, supra note 154, at 54 (discussing the majority opinion in Murr v. Wisconsin, 137 S. Ct. 1933 (2017), which "adopted a federal constitutional-law solution" in determining the meaning of a "parcel" for the purpose of takings cases).

157. Restatement (Second) of Torts § 197(1)(a)–(b).

158. *Cedar Point*, 141 S. Ct. at 2079.

159. Id.

160. See supra note 59.

of choices: hold it (risking severe medical complications and, in extreme cases, death);[161] urinate or defecate in public (damaging public[162] or private property); or soil themselves (damaging their own "chattels").[163] Case law discussing bathroom needs as a necessity defense is sparse. *Commonwealth v. Magadini*, a case decided by the Massachusetts Supreme Judicial Court, alludes to the possibility of such a defense.[164] The case dealt with a criminal trespass charge rather than tortious trespass,[165] but the accompanying necessity defense may be analogous enough to the tort version cited by the *Cedar Point* majority to count as a "background limitation" on the right to exclude.[166] The defendant, David Magadini, was charged with criminal trespass for entering private businesses during several particularly cold Massachusetts days.[167] As a person experiencing homelessness, Magadini argued that he had nowhere else to warm up.[168] The trial court denied Magadini's request to instruct the jury on a necessity defense, determining that Magadini had other, legal options.[169] The Supreme Judicial Court vacated most of Magadini's convictions,

161. See Fecal Impaction, Cleveland Clinic, https://my.clevelandclinic.org/health/diseases/23085-fecal-impaction [https://perma.cc/5MAS-FFBR] (last updated May 19, 2022) ("If left untreated, fecal impaction can cause ulcers, colitis, or obstruction to your colon, which can be fatal."); see also supra note 59 and accompanying text (explaining that when people experiencing homelessness lack access to basic sanitation, they risk health complications).

162. The doctrine of public necessity might apply here. See Restatement (Second) of Torts § 196. Public necessity applies when "the actor reasonably believes" that entrance into the land of another is "necessary for the purpose of averting an imminent public disaster." Id. The examples the Restatement offers are, at first glance, quite extreme: "conflagration, flood, earthquake, or pestilence." Id. cmt. a. Yet the comments and Reporter's Notes to this section describe a sliding scale of "reasonable" responses to various public disasters depending on the circumstances. See id. cmts. e–f. For example, buildings may be torn down to prevent the spread of "conflagration," whereas the spread of smallpox may be mitigated by the burning of infected clothing. See id. cmts. a, f–g, Reporter's Notes. Urinating or defecating in public not only damages property but also carries public health risks. See supra note 60 and accompanying text. Thus, entering a private business to use the restroom may very well prevent both property damage and the spread of "pestilence." The fact that these public health risks are less extreme than those contemplated by the Restatement does not necessarily preclude the application of public necessity because the remedy (entering bathrooms) is commensurately less extreme and is "reasonable" under the circumstances. The cost to private business owners, on the other hand, is slight. See supra note 136 and accompanying text (discussing the burden-spreading benefits of bans on customers-only bathrooms).

163. See Restatement (Second) of Torts § 197(1)(a)–(b). The parentheticals here are meant to demonstrate the relevance of necessity doctrine. Of course, the dignitary harms to those facing this dire set of choices are also worth emphasizing. See supra section I.A.2.

164. 52 N.E.3d 1041 (Mass. 2016).

165. Id. at 1044 ("The defendant, David Magadini, was convicted by jury on seven counts of criminal trespass . . . .").

166. See Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2079 (2021).

167. *Magadini*, 52 N.E.3d at 1046.

168. Id. at 1049.

169. Id. at 1045.

remanding for a new trial with an opportunity for a necessity defense.[170] The court determined that Magadini had satisfied the "foundational conditions" for offering a necessity defense by providing "'some evidence on each of the four underlying conditions of the defense.'"[171] Those elements are:

> (1) a clear and imminent danger, not one which is debatable or speculative; (2) [a reasonable expectation that one's action] will be effective as the direct cause of abating the danger; (3) there is [no] legal alternative which will be effective in abating the danger; and (4) the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue.[172]

Importantly, the court declined to vacate one of the charges.[173] Magadini entered a creamery on a temperate June day—not to warm up but to use the bathroom for "ten to fifteen minutes."[174] Regarding this trespass, the court determined that "the defendant did not meet his burden to show a 'clear and imminent danger'" and thus failed to "demonstrate the foundational requirements for a necessity defense instruction."[175] The court did not, however, completely foreclose the possibility of a necessity defense under similar circumstances. The court reached its decision for two reasons. First, "the defendant did not request a necessity defense instruction on this charge."[176] One might think this was reason enough to put the issue to rest. But the court offered another reason: "Trial counsel asked the clerk present at the time the defendant entered the store whether the defendant said that his entry was 'an emergency and that he really needed . . . to use the bathroom'; she responded, 'No, . . . he didn't say anything to me.'"[177] That the court stressed this piece of testimony suggests that it might have considered a necessity defense under slightly different circumstances. A clearer showing of urgent need might have swayed the court.

Lawmakers should take note of the court's reasoning when drafting laws banning customers-only bathrooms. They might consider following Chicago Alderman Moore's lead. Alderman Moore's proposed law stated that "[a]ny licensee that provides public toilet facilities to its customers must allow individuals who have an *emergency and need* to use the toilet

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170. See id. at 1054.

171. Id. at 1047, 1049 (quoting Commonwealth v. Kendall, 883 N.E.2d 269, 273 (Mass. 2008)).

172. Id. at 1047 (alterations in original) (quoting *Kendall*, 883 N.E.2d at 272–73).

173. See id. at 1054.

174. Id. at 1046.

175. Id. at 1045, 1048.

176. Id. at 1048 n.11.

177. Id.

facilities to do so without having to make a purchase."[178] This language would help ground the access right in a "background limitation" on the right to exclude—the necessity defense—and it mirrors the language that the Massachusetts Supreme Judicial Court stressed.[179]

As the U.S. Supreme Court made clear in *Tyler v. Hennepin County*, state law alone does not define a property right.[180] But Supreme Court precedent also supports a broad necessity exception to *Cedar Point*. The *Cedar Point* majority was a bit unclear about just how "consistent with longstanding background limitations" a law must be to not amount to a taking.[181] How precise must the match be? Is it enough to simply draw *some* legitimacy from common law access privileges?

The *Cedar Point* Court's treatment of *NLRB v. Babcock & Wilcox Co.*[182] (and especially Justice Brett Kavanaugh's concurrence) provides guidance here. In *Babcock*, the Court "held that the [National Labor Relations Act] did not require employers to allow organizers onto their property, at least outside the unusual circumstance where their employees were otherwise 'beyond the reach of reasonable union efforts to communicate with them.'"[183] In other words, the organizers' access right was contingent on whether they had a reasonable need for access. Concurring in *Cedar Point*, Justice Kavanaugh expressed his view that "*Babcock* recognized that employers have a basic Fifth Amendment right to exclude from their private property, subject to a 'necessity' exception similar to that noted by the Court today."[184] The majority was unclear about whether *Babcock* fell

178. Proposed Chicago Bathroom Ordinance, supra note 69 (emphasis added); see also supra notes 69–72 and accompanying text.

179. It's worth considering, however, how this language would play out in practice. Would those seeking to use a business's bathroom need to first tell an employee that they were having an "emergency" and "really needed" to go? See *Magadini*, 52 N.E.3d at 1048 n.11. Or might this language lead to ambiguity or even litigation over what constitutes an "emergency"? These outcomes would open up those without bathroom access to further embarrassment and would fail to remedy the dignitary harms discussed in section I.A.2, supra. On the other hand, one can imagine a scenario in which the "emergency and need" language merely serves as a legal grounding for the statute while going mostly ignored by business owners. Owners and employees might decide that enforcing the "emergency" element is not worth the time and confrontation; such a law would thus operate as a broad ban on customers-only bathrooms. Still, the dignitary risks of this language provide further support for the solution outlined later in section III.B, infra. That is, lawmakers could avoid these problems altogether by paying "just compensation" for the access right they acquire from businesses. See U.S. Const. amend. V.

180. See 143 S. Ct. 1369, 1375 (2023); see also supra notes 151–152 and accompanying text.

181. See Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2079 (2021).

182. 351 U.S. 105 (1956).

183. *Cedar Point*, 141 S. Ct. at 2077 (quoting *Babcock*, 351 U.S. at 113).

184. Id. at 2080 (Kavanaugh, J., concurring).

within the necessity exception.[185] But Justice Kavanaugh's articulation is perhaps the most straightforward explanation of why the Court seemed to treat *Babcock* as good law despite *Cedar Point*'s broader holding that ongoing access rights are typically per se takings.[186]

Notably, an access right for labor organizers seemingly strays from common-law conceptions of necessity found in, say, the Restatement (Second) of Torts.[187] Entry to organize potential union members is not a situation where life or property is seriously and imminently at risk of harm or destruction. *Babcock* does not contemplate violent storms, earthquakes, pestilences, or conflagrations—the kinds of imminent danger that the Restatement envisions.[188] *Babcock* deals with a statute-created necessity.[189] Perhaps labor organizers indirectly protect workers' lives, property, and chattels. But one must work hard to stretch the Restatement—with all its stormy, apocalyptic imagery—to cover *Babcock*'s access right. So maybe the *Cedar Point* Court simply meant that an access right must draw *some* legitimacy from common law limitations. Or perhaps the Court was simply retrofitting its holding with exceptions to avoid disturbing too much legislation. This indeterminacy[190] may cause headaches for municipal leaders considering bans on customers-only bathrooms. But they could hedge against this uncertainty by following Alderman Moore's lead and including need-based language in their bans.

2. *Conditioning Benefits.* — Lawmakers could also condition health and safety benefits on the abolition of customers-only bathroom policies. In *Cedar Point*, the Court limited its holding by emphasizing that "the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking."[191] The Court was primarily concerned with allowing government health and

185. See id. at 2077 (majority opinion) (distinguishing *Babcock* because it "did not involve a takings claim").

186. See id. ("Whatever specific takings issues may be presented by the highly contingent access right we recognized under the NLRA, California's access regulation effects a *per se* physical taking under our precedents.").

187. See supra notes 157–159 and accompanying text.

188. See Restatement (Second) of Torts § 196 cmt. a (Am. L. Inst. 1964) (stating that the doctrine of public necessity applies to "impending public disaster[s] such as a conflagration, flood, earthquake, or pestilence"); id. § 197 illus. 1 ("While A is canoeing on a navigable river, he is suddenly overtaken by a violent storm.").

189. See Nat'l Lab. Rels. Bd. v. Babcock & Wilcox Co., 351 U.S. 105, 109 (1956) ("In each of these cases the Board found that the employer violated § 8(a)(1) of the National Labor Relations Act, 61 Stat. 140, making it an unfair labor practice for an employer to interfere with employees in the exercise of rights guaranteed in § 7 of that Act.").

190. See Lee Anne Fennell, Escape Room: Implicit Takings After *Cedar Point Nursery*, 17 Duke J. Const. L. & Pub. Pol'y 1, 22 (2022) ("Yet the multiple escape hatches enumerated in *Cedar Point*, with their varying levels of subsequent review, make predictions difficult. Questions abound.").

191. *Cedar Point*, 141 S. Ct. at 2079.

safety inspectors access to private businesses.[192] So a government clearly may condition "the grant of a benefit such as a permit, license, or registration" on an access right for inspectors.[193] But may it condition such benefits on an access right for the public? Nothing in the Court's decision explicitly precludes this strategy. The question would become whether the "condition bears an 'essential nexus' and 'rough proportionality' to the impact of the proposed use of the property"—a test that the Court drew from *Dolan v. City of Tigard* and *Nollan v. California Coastal Commission*.[194] In essence, the access right (the permit condition) would need to bear an "essential nexus" to the same "legitimate state interest" that a refusal to grant the benefit would further.[195] The government would also need to show a "rough proportionality" between the strictures imposed by the permit condition and the harms that would ensue if the government were to grant the benefit without it.[196]

In *Cedar Point*, the Court made clear that, in the case of health and safety inspections, "both the nexus and rough proportionality requirements . . . should not be difficult to satisfy."[197] A ban on customers-only bathrooms, however, might not satisfy these conditions so easily. First, as compared with the inspection regimes imagined in *Cedar Point*, the bans would bear a more attenuated nexus to a government interest. Lawmakers could strengthen the nexus by framing their legitimate government interest broadly, calling it "improving public health and safety" or something along those lines. Allowing public access to private bathrooms would improve public health, safety, and well-being.[198] Similarly, when municipal agencies deny permits to private businesses, the denial typically furthers the state interests of health and safety.[199] But this broad framing might not convince courts. More fundamentally, *Dolan* and *Nollan* dealt with proposed development projects that would have had potentially

192. See id. ("Under this framework, government health and safety inspection regimes will generally not constitute takings.").

193. Id.

194. Id. (quoting Dolan v. City of Tigard, 512 U.S. 374, 386, 391 (1994)); see also Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 836 (1987).

195. See *Nollan*, 483 U.S. at 836 ("[A] permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking.").

196. See id.; Fennell, supra note 190, at 28 ("[T]he government must show that the extent of the concession is at least roughly equivalent to the harms that would otherwise ensue if the government were to simply grant the license.").

197. *Cedar Point*, 141 S. Ct. at 2079.

198. See supra notes 59–60 and accompanying text.

199. See, e.g., Food Service Establishment Permit, N.Y.C. Bus., https://www.nyc.gov/nycbusiness/description/food-service-establishment-permit [https://perma.cc/W25Y-TGMC] (last visited Sept. 25, 2023) (describing the health-related aspects of the regulatory requirements for obtaining a Food Service Establishment permit from the New York City Department of Health and Mental Hygiene).

harmful effects.[200] The permit conditions (or "exactions") needed some "essential nexus" to remedying the harmful effects of development.[201] It is difficult to say that establishing and operating bars, restaurants, and shops positively contributes to the bathroom access crisis. This Note has established that customers-only bathrooms are harmful to people experiencing homelessness. But this nexus is perhaps less than "essential." Many factors contribute to homelessness and a lack of bathroom access, including government policy failures. While private business could play an important role in solving the problem, private business alone did not initiate the problem.

It is also difficult to say how these bans would fare on proportionality. The Court has not been entirely clear about what, exactly, must be measured when determining proportionality. Professors Lee Anne Fennell and Eduardo M. Peñalver point out that in *Dolan* "[t]he Court left ambiguous whether it is the harm eliminated by the exaction that must be proportional to the harm the development causes or whether it is the burden of the exaction (to the landowner) that must be proportional to those harms."[202] The burden-spreading benefits of an across-the-board ban on customers-only bathrooms mean the burden to landowners would be fairly small. And such a ban would offer significant benefits to the public. Again, however, private business hasn't initiated the harms associated with a lack of bathroom access, so perhaps there is nothing against which to measure the benefits of this access right.

Cedar Point offered the nexus-and-proportionality test as a "lifeline thrown out to governments in the *per se* realm."[203] But, as Professor Fennell writes, "it may turn out to be a false door or even a trap for the government."[204] This option may prove to be more of an indeterminate headache than the "background limitations" discussed above. Why? First, "exactions scrutiny is so much more exacting than the analysis that generally applies to government actions."[205] Second, the burden falls on the government to

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200. See Lee Anne Fennell & Eduardo M. Peñalver, Exactions Creep, 2013 Sup. Ct. Rev. 287, 292–93 (2014) (describing the development projects in *Nollan* and *Dolan*); see also Dolan v. City of Tigard, 512 U.S. 374, 379 (1994) (describing the petitioner's hardware-store development project); *Nollan*, 483 U.S. at 827 (describing the Nollans' home-rebuild project).

201. See Fennell, supra note 190, at 10 (describing the exaction in question as "something that lacked an 'essential nexus' to the impacts that animated the initial restriction on rebuilding" (citing *Nollan*, 483 U.S. at 837)).

202. Fennell & Peñalver, supra note 200, at 293 n.28.

203. Fennell, supra note 190, at 27.

204. Id. at 26.

205. Id. That said, in *Cedar Point*, the Court "flip[ped] the script by making every minor grant of access a *per se* taking (unless some exception applies)." Id. So, much like the Court's treatment of "background limitations," it is unclear how closely this "escape route" from the per se takings analysis must match the traditional test (in this case, nexus and

affirmatively establish nexus and proportionality.[206] Third, the *Cedar Point* majority cited *Horne v. Department of Agriculture* for the proposition that "'basic and familiar uses of property' are not a special benefit that 'the Government may hold hostage.'"[207] One might think that the operation of businesses of public accommodation is a "basic and familiar usage" and that conditioning a permit on the provision of an access right would improperly "hold hostage" such a use. But how is a bathroom-access regime different from the health and safety inspection regimes offered by the Court as clear-cut examples of a proper exaction? Are the "permit[s], license[s], or registration[s]" to which the *Cedar Point* majority alludes not a similar hostage situation? Much like the "background limitations" exception, the Court seems to have retrofitted an exception into its holding to avoid disturbing important government actions—in this case, health and safety inspection regimes.[208] The uncertainty of this path suggests that lawmakers would be better off situating their laws within one of the other *Cedar Point* exceptions.

3. *Open to the Public.* — Finally, lawmakers could stress that bans on customers-only restrooms would apply only to businesses "generally open to the public," situating these bans closer to *PruneYard*[209] than to *Cedar Point*.[210] Businesses of public accommodation clearly open their doors to the public, thus limiting their right to exclude. For example, a café opening itself up to the public cannot choose to exclude members of certain races.[211] But the bathrooms *themselves* are clearly not open to the public when a business limits them to customers only. Would bans on customers-only bathrooms limit a property owner's right to control access or simply their right to control usage (already having ceded access to the public)? Proponents of these bans could point out that in many cases, only those presenting as homeless are excluded from using the bathroom, whereas

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proportionality). See id. ("Although the majority made [the exactions exception] sound like a simple escape route, it may turn out to be a false door . . . .").

206. Id. at 29.

207. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2080 (2021) (quoting Horne v. Dep't of Ag., 135 S. Ct. 2419, 2430 (2015)); see also Fennell, supra note 190, at 30 ("[*Cedar Point*] suggests we would never even *reach* exactions analysis, because there could be no (real) benefit in the picture that might validate what would otherwise be a *per se* taking.").

208. See Fennell, supra note 190, at 31 ("We know this much: the Court wants a test that health and safety inspections will easily clear and that union access requirements cannot pass under any circumstances.").

209. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980).

210. *Cedar Point*, 141 S. Ct. at 2076–77.

211. See Fennell, supra note 190, at 17 ("Civil rights laws are premised on the idea that regulated actors who make certain kinds of opportunities available cannot make them selectively unavailable based on protected characteristics like race, religion, or gender identity.").

middle-class-presenting noncustomers can waltz into the bathroom without causing concern.[212] In distinguishing its holding from *PruneYard*, the *Cedar Point* Court cited to *Heart of Atlanta Motel, Inc. v. United States*, which rejected a "claim that provisions of the Civil Rights Act of 1964 prohibiting racial discrimination in public accommodations effected a taking."[213] Customers-only bathrooms tend to involve not a blanket exclusion but rather a discriminatory one.

Lawmakers could thus make two related arguments in favor of their bans. First, by opening their businesses to the public, landowners subject themselves to usage regulations, and banning customers-only bathrooms is nothing more than a requirement that businesses allow the public to *use* the bathroom. Under this argument, lawmakers should frame the bathroom as one part of an integrated property unit—a unit whose doors have been opened.[214] Second, lawmakers could argue that the bans are comparable to the Civil Rights Act of 1964. By allowing some noncustomers but not others to use their bathrooms, businesses invite antidiscrimination regulation. Bans on customers-only bathrooms would thus be framed as remedies for ongoing patterns of discrimination. If the bans are successfully situated within *PruneYard*'s holding, the laws would then need

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212. See supra notes 38–41 and accompanying text.

213. *Cedar Point*, 141 S. Ct. at 2076 (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964)); see also Fennell, supra note 190, at 14 ("The Court also included a *cf.* cite to *Heart of Atlanta Motel v. United States* . . . .").

214. The framing of the relevant property unit for takings purposes has long been up for debate. The paradigmatic case for this debate is Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). In that case, the Court considered a law requiring coal mining companies to leave some sections of coal unmined to avoid subsidence. See id. at 412–13. Justice Oliver Wendell Holmes, Jr., wrote for the majority, arguing that the law went "too far" by "taking" this unmined coal. See id. at 415. One factor in Justice Holmes's analysis was the "diminution in value" of the unmined coal. See id. at 419. Justice Louis Brandeis, writing in dissent, agreed that "diminution in value" was a relevant factor but argued that the relevant unit for analysis was "the whole property," not the unmined coal. See id. (Brandeis, J., dissenting). In diminution-of-value cases, courts have referred to this relevant unit as the "denominator." See, e.g., Murr v. Wisconsin, 137 S. Ct. 1933, 1944 (2017) (internal quotation marks omitted) (quoting Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987)). In determining this denominator, courts look to "the reasonable expectations" of property owners based on "background customs and the whole of our legal tradition." Id. at 1945.

Similar principles could help determine the relevant unit for a *PruneYard* analysis. Business owners likely conceive of their bathrooms as a part of an integrated property unit along with the rest of their business space. See, e.g., Bee's Auto, Inc. v. City of Clermont, 927 F. Supp. 2d 1318, 1320–21 (M.D. Fla. 2013) (describing the "parcel of property at issue" in a takings case as containing "a building that is approximately 1,118 square feet in dimension, including two enclosed bays, an office, *two bathrooms*, and an open canopy structure" (emphasis added)). On the other hand, business owners can reasonably expect, based on longstanding practice, to have some control over who can access their bathroom space. See supra section II.B.1.

to pass the relatively unexacting *Penn Central* test,[215] which they could most likely do given the low burden the test places on individual businesses.

This section has laid out three pathways through *Cedar Point*'s per se takings holding. First, lawmakers could rely on the necessity doctrine as a "background limitation" on property rights. Second, they could condition government benefits such as permits and licenses on businesses opening their bathrooms to the public. And third, they could stress that these bans fall within *PruneYard*'s holding and pass the *Penn Central* test. The conditional exactions route might be more confusing and indeterminate than it's worth. The third option is likely the most straightforward route.[216] But the fact that bathrooms are often segmented off as more exclusive zones might render this option insufficient. So, lawmakers would be well advised to use a belt-and-suspenders approach, relying on the necessity doctrine as a backup plan.

Local leaders should be careful to emphasize the benefits of these bans, especially if they decide to forgo compensating business owners for the access right. They should stress that by conscripting a wide class of businesses, the burden of providing bathroom access would be spread widely enough to minimize the cost of upkeep for each individual business. Further, local governments could join the fight by committing to building and operating public (i.e., government-operated) bathrooms. This would further spread the burden by taking advantage of both private and public infrastructure options. It would also help governments avoid the appearance of buck-passing. Additionally, governments could frame private bathroom access as an antidiscrimination issue, arguing that the right to exclude shouldn't justify discriminatory exclusion. And finally, governments should stress that people experiencing homelessness aren't the only ones in need of bathrooms—more and more urban dwellers are clamoring for expanded bathroom access.[217] By framing bans as a solution for all, governments could avoid stirring up discriminatory backlash.

B. *Offering Just Compensation*

Even if bans on customers-only bathrooms are not takings, lawmakers may want to consider paying "just compensation"[218] anyway. In doing so, they could avoid the indeterminacy of the post–*Cedar Point* takings landscape, save on potential litigation costs, and soften the political blow

215. See supra note 118 and accompanying text.

216. See Fennell, supra note 190, at 14 ("Perhaps the simplest way for the government to escape liability for a *per se* physical taking is to establish that the landowner actually invited the intrusion.").

217. See supra notes 61–63 and accompanying text.

218. U.S. Const. amend. V.

for business owners.[219] This solution would also prioritize the dignity of those living in homelessness because lawmakers could skip statutory language invoking necessity and thus avoid requiring those in need of a bathroom to prove that they "really need" to go.[220] Professor Fennell, after surveying the Court's takings cases, concludes that paying just compensation "is a simple and well-marked way out of the labyrinth" and will often be "cheaper and less risky than attempting to make the necessary showings."[221] By way of example, Professor Fennell shows that "just compensation" for the Cedar Point Nursery might be as low as $4.51 per year.[222]

Cities in the United Kingdom and Germany have found some success incentivizing private businesses to open their bathrooms to the public.[223] The District of Columbia recently followed suit by passing a similar initiative, which is apparently still in the pilot phase of implementation.[224] These initiatives offer a yearly stipend ranging from $650 to $2,000 for private businesses to open their bathrooms to the public.[225] The participants place a sign or sticker on their storefronts to indicate that their bathrooms are available for use, and municipalities display signs directing people to participating businesses.[226] These programs avoid political blowback by making participation voluntary. But their voluntary nature comes with downsides. First, they "reinforce the norms around 'For Customers Only' policies at businesses that are not part of the program."[227] These norms include discriminatory enforcement and "the stigmatization of homeless individuals to whom they send the message that one's financial worth is tied to their humanity."[228] Second, they might fail to adequately incentivize early adoption. The first volunteers would shoulder a heavier burden than later adopters. And finally, voluntary programs would not meet the

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219. See Fennell, supra note 190, at 59 ("[P]recommitting to paying just compensation, perhaps by setting aside resources earmarked for this purpose, might prove a valuable strategic move.").

220. See supra note 179 and accompanying text.

221. Fennell, supra note 190, at 54.

222. See id. at 56.

223. See Hochbaum, Bathrooms and Homeless Rights, supra note 14, at 253–54; see also, e.g., Communities and Local Government Committee, The Provision of Public Toilets, 2007-8, HC 636, at 23 (UK), https://publications.parliament.uk/pa/cm200708/cmselect/cmcomloc/636/636.pdf [https://perma.cc/8EWW-5RVQ] (detailing the robust participation of "pubs, restaurants, cafes, community centres, retail stores, Council offices and supermarkets" in the Borough of Richmond's community toilet scheme).

224. See D.C. Code § 10-1053 (2023); Community Restrooms Incentives Pilot, D.C. Pub. Restrooms, https://dcpublicrestrooms.org/dc-public-restroom-law/community-restrooms-incentives-pilot/ [https://perma.cc/RY8S-HQ9A] (last visited Sept. 25, 2023).

225. Julie Chou, Kevin A. Gurley & Boyeong Hong, Urb. Design F., The Need for Public Bathrooms 28 (2020), https://urbandesignforum.org/wp-content/uploads/The-Need-for-Public-Bathrooms.pdf [https://perma.cc/G2RY-GZ77].

226. See id.

227. Hochbaum, Bathrooms and Homeless Rights, supra note 14, at 258.

228. Id.

public's bathroom needs as swiftly or comprehensively as would across-the-board bans on customers-only bathrooms.[229] The slow, multiyear rollout of the D.C. program illustrates this problem.[230]

Lawmakers could combine some of these programs' compensation schemes with an involuntary ban. The European programs can provide a baseline for calculating just compensation, a task that is not always possible.[231] The most common method for calculating just compensation is "to examine recent transactions of other property similar to the property taken, making adjustments for differences in the size, age, location, and the quality of improvements."[232] This provides an approximation of the fair market value of whatever property has been taken.[233] Fair market value is "what a willing buyer would pay a willing seller in an arm's-length transaction."[234] Here, municipalities in the United Kingdom and Germany provide a robust set of examples of similar, recent transactions—"willing buyers" (municipalities) and "willing sellers" (businesses). Recent research shows, for example, that an access right to a single, unisex bathroom in London cost £550 per year (approximately $670); a similar bathroom in another London borough cost £800 per year (approximately $970; the amount paid varied by borough, hours of operation, and available facilities).[235]

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229. See id. at 258–59 ("This proposal, which essentially bans 'For Customers Only' policies, would be the most comprehensive of the three proposals and would likely immediately solve most of the issues of bathroom availability in metropolitan areas.").

230. See Maydeen Merino, As DC Lapses on Porta Pottie Contract, Public Restroom Pilot Programs Inch Forward, St. Sense Media (Nov. 3, 2021), https://www.streetsensemedia.org/article/dc-lapses-porta-pottie-contract-public-restroom-pilot-programs/#.Y5-5Ci-B30o [https://perma.cc/XTJ4-ZMRC] ("As for the other part of the public restroom law, the business incentive program, the next step after public comment will be for the Department of Small and Local Business and the Downtown D.C. Business Improvement District to negotiate agreements with businesses . . . .").

231. See Thomas W. Merrill, The Compensation Constraint and the Scope of the Takings Clause, 96 Notre Dame L. Rev. 1421, 1421 (2021). Professor Thomas W. Merrill has hypothesized that "the ability to calculate just compensation, using established valuation techniques, is a necessary condition for finding that the Takings Clause applies." Id. So if calculating just compensation for bans on customers-only bathrooms proved impossible, that might indicate that the Takings Clause does not apply anyway. As this section will demonstrate, however, just compensation *can* be calculated.

232. Id. at 1422.

233. Here, the "property" being taken is an "access right," which is carved out from the landowner's bundle of property rights. This can be conceptualized as a "partial taking." See id. at 1431–32 ("Many, perhaps most, physical takings are partial takings. That is, the condemning authority acquires only a portion of the owner's property and leaves the rest in the owner's hands." (footnote omitted)).

234. Id. at 1422.

235. Margit Physant, Community Toilet Schemes in London 2 (2022), https://www.ageuk.org.uk/bp-assets/globalassets/london/documents/campaigns/community-toilet-schemes-in-london—report-by-margit-physant.pdf [https://perma.cc/ZM9H-KELF]. Currency conversions were conducted using Pound sterling to United States Dollar, Google Finance, https://www.google.com/finance/quote/GBP-USD?sa=X&ved=2ahUKEw

Compensating private business owners for access to their bathrooms is significantly more cost-effective than building and operating public bathrooms. For example, one "no-frills" New York City public bathroom cost around $3 million to construct; cheaper alternatives run about $185,000 apiece (before installation costs).[236] And municipalities could limit the hit to their budgets by restricting the class of businesses affected by the bans. For example, New York City could restrict bans on customers-only bathrooms to fast food restaurants and coffee shops—a total of around 2,100 establishments.[237] For the sake of illustration, assume the average establishment within this class has two unisex, single-toilet bathrooms. Fair market value for access rights to one such bathroom is somewhere in the $670 to $970 range, drawing from London's recent transactions. So, the price for access rights to two unisex bathrooms might be around $1,700. That value multiplied by the 2,100 establishments within the class results in a total yearly expenditure of just under $3.6 million. For comparison, one public bathroom built in 2019 at the Green Central Knoll Playground in Brooklyn cost about $3.7 million.[238]

Municipal leaders could offer this compensation in the form of tax breaks, direct payments, or whatever form they find easiest to administer. In return, businesses within the relevant class would be required to display a sign or sticker indicating a usable bathroom within. Laws banning customers-only bathrooms could establish reasonable fines for failing to display this signage, which could be assessed during routine building inspections.[239] Municipalities could establish an online complaint filing system and a private or administrative right of action to prevent businesses

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jKhq2bjIuCAxXPGFkFHVOkBPcQmY0JegQIBhAr [https://perma.cc/YD7Z-GT6C] (last visited Oct. 22, 2023).

236. Yoav Gonen, Modular Portland Loo Toilets Are Finally Coming to New York City, The City (Feb. 27, 2023), https://www.thecity.nyc/2023/02/27/portland-loo-park-bathrooms/ [https://perma.cc/G7Y6-F2MR] ("The five Portland Loo toilets . . . cost roughly $185,000 each . . . . But the overall budget to buy and install five Portland Loos, in one pilot location in each borough, starting as early as summer 2024, could reach as much as $5.3 million.").

237. See Sophia Annabelle Klein, Charles Shaviro & Jonathan Bowles, Ctr. for an Urb. Future, State of the Chains, 2022, at 21 (2022), https://nycfuture.org/pdf/CUF_StateoftheChains_final_2022.pdf [https://perma.cc/99SA-GW62] (providing data on the number of chain retail stores in New York City, showing 1,068 fast-food restaurants and 1,042 coffee shops). Of course, some smaller establishments might not even offer bathrooms to paying customers, thus further shrinking the total number of establishments. (And, some non-chain establishments may provide restroom access.) Even if this is an over- or undercount, the illustration provides a helpful baseline.

238. Chou et al., supra note 225, at 14.

239. Municipalities could look to other existing fines to determine what is reasonable. A helpful analogy in New York City, for example, is a $200 fine for failing to properly maintain or install plumbing. See What's Required to Do Business in New York City?: Avoid Violations, N.Y.C. Bus., https://nyc-business.nyc.gov/nycbusiness/resources-by-industry/restaurant [https://perma.cc/2XEM-M324] (last visited Oct. 1, 2023).

from excluding noncustomers.[240] Social services organizations and municipal human services departments could help educate the homeless public about their new access rights. While this still might cause some business owners to grumble, just compensation should provide some buffer against political blowback. Further, it would allow municipalities to avoid *Cedar Point*'s seemingly broad holding.

This option—paying just compensation—also has strong normative force. In *Armstrong v. United States*, Justice Hugo Black wrote for the majority, penning these oft-repeated words: "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[241] So who *should* bear the cost of homelessness? Customers-only bathroom policies deny relief to people experiencing homelessness, and banning them would alleviate suffering. But the problem of bathroom access was not created by café owners.[242] As with the broader homelessness crisis, the cause is complex. We—"the public as a whole"[243]—must confront the ways in which we've failed those without a home. We the people who avert our eyes from those sleeping on the sidewalk. We the lawmakers (and the voters who elect them) who have failed to operate enough public bathrooms, who have failed to care for the needs of the desperate. We the residents of big, blue cities who NIMBY our way out of lasting solutions.[244] Let us confront our failure by inviting the destitute into our intimate spaces and daily routines—our collective dining room tables and the places we spend the cash we told the guy on the subway we didn't have. Rather than wrangling over formal legal categories and passing off responsibility, let us join together to bear the cost.

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240. In *Pilotto v. Urban Outfitters West, L.L.C.*, the Appellate Court of Illinois determined that the state's Ally's Law included an implied right of private action because the $100 fine for violations did not sufficiently dissuade repeated violations. See 72 N.E.3d 772, 786 (Ill. App. Ct. 2017). Lawmakers should follow the Illinois Appellate Court's reasoning by explicitly including a right of action in ordinances banning customers-only bathrooms. See Weinmeyer, supra note 15, at 26–27 (describing the enforcement problems articulated by the *Pilotto* court).

241. 364 U.S. 40, 49 (1960); see also Tyler v. Hennepin County, 143 S. Ct. 1369, 1380 (2023) (repeating Justice Black's language from *Armstrong*); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123 (1978) (same).

242. See supra note 35 and accompanying text.

243. *Armstrong*, 364 U.S. at 49.

244. NIMBY stands for "not in my backyard" and refers to "the kind of people who believe in affordable housing until it's in their neighborhood." Diana Budds, Obama Blames Liberal NIMBYs for the Housing Crisis Too, Curbed (June 29, 2022), https://www.curbed.com/2022/06/obama-aia-conference-housing-crisis-liberal-nimby-yimby.html [https://perma.cc/2Z3Y-DVZL].

CONCLUSION

Customers-only bathroom policies have adverse, discriminatory effects on people experiencing homelessness. Banning such policies would not end homelessness, but it could significantly alleviate the suffering of society's most vulnerable. Lawmakers could enact such bans by either charting a path through *Cedar Point*'s takings doctrine or circumnavigating its holding altogether by paying just compensation. But this Note is more than a study of takings doctrine. Hopefully it serves as a reminder that the law ought to care about less-than-glamorous problems affecting people we'd too often prefer to ignore.

THE BRIEF LIFE AND ENDURING PROMISE OF CIVIL RIGHTS REMOVAL

*Andrew Straky**

The Reconstruction Congress provided for civil rights removal jurisdiction to enable a state-court defendant with defenses based on federal civil rights to remove the case against them to federal court. A series of late nineteenth-century Supreme Court decisions rendered the provision practically useless until Congress invited federal courts to reinterpret the statute in the Civil Rights Act of 1964. New archival research reveals how lawyers at the forefront of the Civil Rights Movement immediately embraced the tool, now codified at 28 U.S.C. § 1443, to shift from state to federal court thousands of cases brought against demonstrators and local residents seeking to exercise their federal civil rights. That brief moment came to an end when the Supreme Court reaffirmed its narrow view of the provision just two years later, and the statute has remained mostly dormant ever since.

This Note argues that the utility of civil rights removal, as revealed in the overlooked story of its use during the Civil Rights Movement, should be restored through a modernized statute that clearly defines removal's role in shifting the power over forum choice to defendants when other forms of relief and review are inadequate to address the potential for bias against those raising civil rights defenses. It includes an analysis of court records for almost 5,000 criminal cases filed in federal courts in Mississippi from 1961 through 1969, including almost 1,200 cases removed from Mississippi state courts between 1964 and 1966.

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INTRODUCTION

Summer 1964 was a season of organizing, education, and bloodshed in Mississippi.[1] As students, attorneys, and activists descended on the state to aid Black Mississippians in their fight to exercise their federally guaranteed rights amid violent state opposition, civil rights lawyers embraced an obscure procedural tool—the civil rights removal statute—to successfully

1. See Doug McAdam, Freedom Summer 4 (1988) (describing the efforts of more than a thousand young local activists and volunteers from the North to register Black voters and provide educational lessons in Freedom Schools—as well as the violence that plagued their activism). For additional background on Freedom Summer, see generally Seth Cagin & Philip Dray, We Are Not Afraid: The Story of Goodman, Schwerner, and Chaney and the Civil Rights Campaign for Mississippi (1988) (providing a detailed account of the abductions and murders of Freedom Summer volunteers Andrew Goodman, Michael Schwerner, and James Chaney at the hands of local government officials and the Ku Klux Klan as well as the federal prosecution that followed); Charles M. Payne, I've Got the Light of Freedom: The Organizing Tradition and the Mississippi Freedom Struggle (1995) (examining the community organizing tradition of Black activism in Mississippi throughout the 1960s, including during Freedom Summer).

rescue thousands of litigants from the state's prejudiced justice system. That phenomenon, often overlooked in the story of Freedom Summer, is central to understanding the roles of and relationship between the state and federal courts during the height of the Civil Rights Movement as well as that relationship's impact on the recognition of federal civil rights claims.

Passed by the Reconstruction Congress amid its broad expansion of federal jurisdiction, civil rights removal enables a defendant in state court with defenses based on federal civil rights to remove the case against them—civil or criminal—to federal court.[2] The statute, currently codified at 28 U.S.C. § 1443,[3] was drastically narrowed by the Supreme Court in a series of late nineteenth-century decisions that rendered the provision practically useless.[4] Congress took steps to revitalize it nearly a century later in the Civil Rights Act of 1964,[5] and lawyers at the forefront of the Civil Rights Movement immediately employed the tool to strategically shift from state to federal court thousands of cases brought mostly in southern states against local residents and demonstrators seeking to exercise federal civil rights.[6] But just two years later, the Supreme Court once again narrowed the provision, and it has remained mostly dormant ever since.[7]

The story of that brief moment of procedural innovation reveals civil rights removal's underrealized utility as a forum choice device for situations in which other forms of relief and review are inadequate to address potential procedural and judicial biases against people raising civil rights defenses. In the 1960s, when defendants and their lawyers saw no hope for justice in southern state court systems or ex post federal review, they embraced the choice provided by civil rights removal to shift massive numbers of cases to federal district courts.[8] Were that choice available to defendants today, the decision to remove would not be so obvious because

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2. See infra section I.A.

3. The full text of the current civil rights removal statute reads:

> Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

28 U.S.C. § 1443 (2018).

4. See infra section I.B.

5. See infra section II.A.

6. See infra section II.B.

7. See infra section II.C.

8. See infra section II.B.

contemporary prejudices against those seeking to exercise individual rights are now more subtle and dispersed, including across the state and federal judiciary.[9] But since hidden biases are harder to detect—and thus harder to remedy—in individual civil rights cases, it is all the more important in these circumstances to empower defendants—who are best positioned to determine which forum is most likely to grant them a fair hearing—with the choice to remove.

This Note argues that the utility of civil rights removal, as revealed in the overlooked story of its use during the Civil Rights Movement, should be restored through a modernized statute that clearly defines removal's role in shifting the power over forum choice to defendants when there is a risk of bias against recognizing federal rights.[10] Part I surveys the origin and judicial limitation of civil rights removal during the Reconstruction era. Part II uncovers the practical role of civil rights removal during the brief period between its resurrection by Congress in 1964 and its second judicial restriction in 1966; it includes a close examination of how civil rights lawyers employed the tool in Mississippi, drawing from a review of the original case files for almost 5,000 criminal cases filed in federal district courts—including more than 1,200 cases removed from Mississippi state courts—during the 1960s.[11] Finally, Part III characterizes civil rights removal's proper role in the federal system and imagines how a revitalized statute might fulfill that function in modern times.

I. THE RECONSTRUCTION ERA: AN EQUITABLE AIM QUICKLY LIMITED

Federal courts have jurisdiction over a limited set of cases as prescribed by the U.S. Constitution and federal statutes.[12] Congress has provided for removal—the procedure by which a defendant may transfer a case from a state trial court to a federal district court—since the creation of lower federal courts in the Judiciary Act of 1789, and it is "regularly classified as one of the bases for federal court subject-matter jurisdiction."[13] While removal was originally available only to nonresident

9. See infra Part III.

10. See infra section III.B.

11. The Appendix to this Note provides docket information for the criminal cases removed from Mississippi state courts from 1961 through 1969. See infra Appendix A.

12. See U.S. Const. art. III, § 2 (extending the judicial power to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties" as well as all cases "between Citizens of different States"); Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (conferring diversity jurisdiction on the federal courts); Hertz Corp. v. Friend, 559 U.S. 77, 84 (2010) (noting that Article III's language "does not automatically confer . . . jurisdiction upon the federal courts" but rather "authorizes Congress to do so and, in doing so, to determine the scope of the federal courts' jurisdiction within constitutional limits").

13. Debra Lyn Bassett & Rex R. Perschbacher, The Roots of Removal, 77 Brook. L. Rev. 1, 2 (2011); see also Judiciary Act of 1789 § 12, 1 Stat. at 79–80 (providing for removal);

defendants in diversity suits[14] and later extended to federal customs and revenue officers,[15] today almost any defendant in a civil action over which state and federal courts have concurrent jurisdiction may effect removal by filing a petition in the federal court to which removal is sought, which automatically strips the state court of jurisdiction and stays the state proceeding unless the federal court remands the case.[16] This mechanism was designed from the beginning to "allow certain types of parties to whom state courts might not give a fair shake a chance to get into a federal forum."[17]

The most notable expansion of removal jurisdiction took place during and after the Civil War, when Congress vastly broadened federal jurisdiction—especially as to the enforcement of civil rights[18]—and with it the federal system's dominance over state courts.[19] One form of that

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Anthony G. Amsterdam, Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial, 113 U. Pa. L. Rev. 793, 842 n.195 (1965) [hereinafter Amsterdam, Federal Removal] (defining removal). This despite the Constitution saying nothing about removal. See Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 349 (1816) ("This power of removal is not to be found in express terms in any part of the constitution . . . .").

14. See Judiciary Act of 1789 § 12, 1 Stat. at 79–80; William M. Wiecek, The Reconstruction of Federal Judicial Power, 1863–1875, 13 Am. J. Legal Hist. 333, 336–37 (1969).

15. See Force Bill, ch. 57, § 3, 4 Stat. 632, 633–34 (1833) (revenue officers); Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198–99 (customs officers); see also Wiecek, supra note 14, at 337 (describing these statutes). Further development of federal removal jurisdiction in the nineteenth century is outlined in part below, see infra notes 20–21, 31–40, and accompanying text; it is examined in detail elsewhere, see Stanley I. Kutler, Judicial Power and Reconstruction Politics 143–60 (1968); Wiecek, supra note 14, at 338–42.

16. See 28 U.S.C. §§ 1441, 1446–1447 (2018); Amsterdam, Federal Removal, supra note 13, at 845 n.211, 858 n.246; Bassett & Perschbacher, supra note 13, at 5. The most common exception to this rule involves civil actions (1) brought against resident defendants and (2) removable solely based on diversity jurisdiction. See 28 U.S.C. § 1441(b)(2).

17. Benno C. Schmidt, Jr., Juries, Jurisdiction, and Race Discrimination: The Lost Promise of *Strauder v. West Virginia*, 61 Tex. L. Rev. 1401, 1429–30 (1983). Modern legislation and scholarship recognize additional purposes for removal. See, e.g., Saurabh Vishnubhakat, Pre-Service Removal in the Forum Defendant's Arsenal, 47 Gonz. L. Rev. 147, 151 (2011) (highlighting congressional action on removal since 1976 that addresses concerns such as cost, delay, and the types of disputes resolved by federal courts). Bias is also a widely accepted justification for diversity jurisdiction. See, e.g., Erie R.R. v. Tompkins, 304 U.S. 64, 74 (1938) ("Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State.").

18. See Robert J. Kaczorowski, The Politics of Judicial Interpretation: The Federal Courts, Department of Justice, and Civil Rights, 1866–1876, at 1, 3–4, 20 (Fordham Univ. Press 2005) (1985).

19. See Kutler, supra note 15, at 143 (describing removal as "[t]he most far-reaching example" of the Reconstruction Congress's expansion of federal jurisdiction); Michael G. Collins, The Unhappy History of Federal Question Removal, 71 Iowa L. Rev. 717, 720 (1986) (noting that the vesting of general federal question jurisdiction in the lower federal courts in 1875 "was part of a larger substantive law and jurisdictional revolution that was an outgrowth of the Civil War and Reconstruction"); see also Jurisdiction and Removal Act of 1875, ch. 137, §§ 1–2, 18 Stat. 470, 470–71 (giving lower federal courts original jurisdiction over federal question suits and enabling removal on that basis).

expansion was Congress's extension of removal to federal officers in nearly all civil and criminal actions arising out of their official acts.[20] Another, in the Civil Rights Act of 1866, extended removal to defendants in certain matters—civil or criminal—implicating federal civil rights, even if a federal court would otherwise lack concurrent jurisdiction as normally required.[21] But the latter provision, on which this Note focuses, has been practically available to defendants for only a handful of years since its enactment more than 150 years ago due to a series of Supreme Court decisions construing the statute very narrowly.[22]

This Part traces most of that history. Section I.A examines the Reconstruction Congress's enactment of the civil rights removal statute in the 1860s, and section I.B analyzes the Supreme Court's restrictive interpretations of the provision in a series of late nineteenth-century cases.

A. *Reconstruction Removal*

Civil rights removal emerged amid a fundamental shift in Congress's view of the relationship between the states and the federal government.[23]

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20. See Act of July 13, 1866, ch. 184, § 67, 14 Stat. 98, 171–72 (revenue officers and their agents defending actions taken under color of office); Habeas Corpus Act of 1863, ch. 81, § 5, 12 Stat. 755, 756–57 (all federal officers—civil or military—defending actions taken under color of office during the Civil War); see also Schmidt, supra note 17, at 1429–31 & n.145 (discussing several removal provisions enacted during the nineteenth century); Wiecek, supra note 14, at 338–39 (explaining that the Reconstruction Congress expanded removal for federal officers both "as an auxiliary procedural device for protecting the enforcement of substantive policies unrelated to removal" and "with the explicit and primary objective of expanding federal judicial power"). The broader successor to these statutes is the federal officer removal statute, codified at 28 U.S.C. § 1442.

21. See Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27, 27 (codified as amended at 28 U.S.C. § 1443) (civil rights removal statute); Schmidt, supra note 17, at 1429–30.

22. A brief timeline: Congress provided for civil rights removal in the Civil Rights Act of 1866, § 3, 14 Stat. at 27. See infra section I.A. The Supreme Court severely limited the statute less than fifteen years later in Strauder v. West Virginia, 100 U.S. 303 (1880), and Virginia v. Rives, 100 U.S. 313 (1880). See infra section I.B. The statute remained dormant until Congress invited judicial reinterpretation in the Civil Rights Act of 1964, Pub. L. No. 88-352, sec. 901, 78 Stat. 241, 266 (codified as amended at 28 U.S.C. § 1447(d)). See infra section II.A. Just two years later, the Court again severely limited the statute's usefulness in Georgia v. Rachel, 384 U.S. 780 (1966), and City of Greenwood v. Peacock, 384 U.S. 808 (1966). See infra section II.C.

23. See Richard White, The Republic for Which It Stands: The United States During Reconstruction and the Gilded Age, 1865–1896, at 74 (2017) ("The Republicans sought to abrogate judicial interpretations of the Constitution that, in the name of federalism, had limited the extension of a uniform set of rights applicable to all citizens everywhere in the Union."); see also Amsterdam, Federal Removal, supra note 13, at 828–29 (suggesting that the Reconstruction Congress abandoned the "assumption . . . that the state courts were the normal place for enforcement of federal law save in rare and narrow instances where they affirmatively demonstrated themselves unfit or unfair"); supra notes 18–19 and accompanying text; infra note 27. Professor Anthony G. Amsterdam's article on the civil rights removal statute, 28 U.S.C. § 1443 (1958), and the federal habeas corpus statute, id. § 2241, is the most detailed and comprehensive work on the topics. For an overview of the

Before the Civil War, private litigants "generally had to look to the state courts in the first instance for vindication of federal claims, subject to limited review by the Supreme Court."[24] Federal courts possessed narrow civil diversity and removal jurisdiction to combat extreme instances of local prejudice, but they were excluded from involvement in state criminal proceedings.[25] Limited exceptions during the early and mid-nineteenth century gave way to significant encroachments on state courts during and immediately after the war.[26] While there is ample debate over the intent behind these expansions of federal jurisdiction,[27] it is clear that Congress during this period took significant, unprecedented steps to secure the liberty and equality of Black Americans and that accompanying those steps were statutory commitments to uphold federal authority against state resistance.[28]

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origin of these statutes amid Congress's reevaluation of federalism in matters of civil rights, see generally Amsterdam, Federal Removal, supra note 13, at 805–42. For a critique of Amsterdam's framing of the cases interpreting these provisions, see Schmidt, supra note 17, at 1437–38 (describing Amsterdam's work as "[e]rudite and brilliant" but "a work of advocacy"). Professor Benno C. Schmidt, Jr., offers his own analysis of the Reconstruction Congress's views on these matters, arguing that Republican members' rigid commitment to antebellum conceptions of federalism "doomed Reconstruction's hopes for the future." See id. at 1492–97.

24. Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 780–81 (7th ed. 2015); see also Amsterdam, Federal Removal, supra note 13, at 828.

25. Amsterdam, Federal Removal, supra note 13, at 805–06. The original grant of removal jurisdiction did not enable removal for criminal defendants. See Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79–80.

26. See Amsterdam, Federal Removal, supra note 13, at 806–11 (detailing such jurisdictional expansions between 1815 and 1866). Among those limited exceptions was the first incarnation of federal officer removal jurisdiction, which originated for revenue officers in the Force Bill, ch. 57, § 3, 4 Stat. 632, 633–34 (1833), before expanding to its current form in 1948, see Act of June 25, 1948, ch. 646, § 1442, 62 Stat. 869, 938 (codified as amended at 28 U.S.C. § 1442 (2018)); Amsterdam, Federal Removal, supra note 13, at 806–07 & n.62. On the broader encroachments, see supra notes 18–21 and accompanying text.

27. Whether these statutes and the Fourteenth Amendment were intended to transform the federal system is a deeply contested issue more capably examined elsewhere. Compare Amsterdam, Federal Removal, supra note 13, at 828 ("Now the federal courts were seen as the needed organs, the ordinary and natural agencies, for the administration of federal rights."), with Schmidt, supra note 17, at 1492–95 ("The fundamental institutional assumption of Reconstruction . . . was that the day-to-day protection of person and property remained the responsibility of the states. . . . [T]he federal trial courts would be contingent and secondary, available for the occasional instance of state judicial error or defiance of federal law."). See also supra note 23. Schmidt nonetheless recognized "an equally fundamental, theoretical commitment of Reconstruction"—that "the freedmen should enjoy basic civil rights, federally guaranteed and federally protected if necessary"—and viewed the civil rights removal statute as "the central means for spanning the gap between institutional assumptions and theoretical commitments." Schmidt, supra note 17, at 1492.

28. See Amsterdam, Federal Removal, supra note 13, at 828–29 (identifying the three Reconstruction amendments and four civil rights acts during this period); see also, e.g., Monroe v. Pape, 365 U.S. 167, 180 (1961) (characterizing the Civil Rights Act of 1871, ch. 22, 17 Stat. 13, as "passed . . . to afford a federal right in federal courts because . . . [the]

The first of these postwar measures was the Civil Rights Act of 1866, enacted by Congress over President Andrew Johnson's veto on April 9, 1866.[29] The first major civil rights legislation acknowledged in its first section the citizenship of all persons born in the United States regardless of race and affirmed that all possess the same rights "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as [are] enjoyed by white citizens."[30] Its third section conferred civil rights removal jurisdiction on the lower federal courts for the first time, enabling removal for "persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act."[31]

Many scholars have described the removal provision as one of obscurity, and its scarce legislative history has aggravated interpretative efforts.[32] Debates from the statute's genesis—over, for example, what it means to be denied or unable to enforce one's rights and which rights in particular enable removal—have surely contributed to the law's enduring ineffectiveness.[33] Yet most agree that part of Congress's motivation for expanding federal jurisdiction during this time was its recognition that Supreme Court review of state judgments was inadequate to ensure federal constitutional and statutory protections amid their nonrecognition by state courts.[34] Given the volume of civil rights cases and the Supreme

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rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies"). Professor Robert J. Kaczorowski closely examines whether those statutory commitments (including civil rights removal) were effectively enforced by various government organs in the immediate aftermath of the war. See Kaczorowski, supra note 18.

29. See Civil Rights Act of 1866, ch. 31, 14 Stat. 27; S. Exec. Doc. No. 39-31 (Mar. 27, 1866) (President Johnson's message to Congress regarding his veto); see also Schmidt, supra note 17, at 1493 (explaining the veto as "partly because [Johnson] thought the removal provision would displace the state courts in all cases involving the freedmen").

30. Civil Rights Act of 1866 § 1, 14 Stat. at 27.

31. Id. § 3, 14 Stat. at 27. For a meticulous treatment of the legislative history behind this provision, see Amsterdam, Federal Removal, supra note 13, at 810–18 & nn.77–108.

32. See, e.g., Amsterdam, Federal Removal, supra note 13, at 843 ("exquisite obscurity"); Schmidt, supra note 17, at 1429 ("consummate obscurity"); see also Amsterdam, Federal Removal, supra note 13, at 814 (recognizing how little is revealed in the statute's legislative history).

33. See Schmidt, supra note 17, at 1431 (positing that nobody "in the Reconstruction Congress had considered the conceptual or factual predicates necessary for the conclusion that a criminal defendant could not enforce his or her 'equal civil rights' in the state courts"); infra sections I.B, II.C (describing the Supreme Court's grappling with these questions in the nineteenth and twentieth centuries, respectively).

34. See, e.g., Amsterdam, Federal Removal, supra note 13, at 808–09 & n.70 (describing congressional debates on federal officer removal to the same effect); Michael G. Collins, The Right to Avoid Trial: Justifying Federal Court Intervention Into Ongoing State Court Proceedings, 66 N.C. L. Rev. 49, 79 (1987) [hereinafter Collins, Federal Court

Court's limited capacity to review appeals, withholding jurisdiction from lower federal courts to conduct widespread enforcement of federal rights would have an effect "indistinguishable from that of a substantive statute foreclosing [those] claim[s]."[35]

The 1866 Act motivated many members of Congress to support adopting the Fourteenth Amendment during the same Congress.[36] After the Amendment's ratification, the next Congress reenacted the entirety of the 1866 Act in the Civil Rights Act of 1871,[37] and in 1875, the *Revised Statutes of the United States* carried forward all of the civil rights provisions Congress had produced during the preceding decade, including the civil rights removal provision.[38] As codified, the removal provision's language was slightly broader than its original version, now referring generally to "any right secured . . . by any law providing for the equal civil rights of citizens" rather than only to the provisions in the first section of the 1866 Act.[39] The provision has largely maintained its current form since that revision.[40]

Intervention]; Theodore Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J. 498, 521–23 & n.127 (1974); Schmidt, supra note 17, at 1498–99 ("The Supreme Court can police the surface of state law. . . . But unless a vigorous lower federal judiciary is committed to the task of enforcement, nondiscrimination principles will stop at the surface if the state courts dedicate themselves to evasion.").

35. Eisenberg, supra note 34, at 523. This view that Supreme Court review is inadequate to protect federal civil rights has endured. See, e.g., Fallon et al., supra note 24, at 1281 (noting that one justification for the Court's decision in Brown v. Allen, 344 U.S. 443 (1953), "rests on the inability of the Supreme Court adequately to protect constitutional rights through its direct review of state court judgments"); Henry J. Friendly, Federal Jurisdiction: A General View 102–03 (1973) (discussing the "inadequacies" of leaving "private civil rights litigants . . . to the state courts with the attendant possibility of Supreme Court review" and concluding that it would be "a serious mistake to impose a general requirement of 'exhaustion' of state judicial remedies in civil rights cases").

36. See Hurd v. Hodge, 334 U.S. 24, 32–33 & nn.11–14 (1948) (noting that many members supported adopting the Fourteenth Amendment "to incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land" or "to eliminate doubt as to the constitutional validity of the Civil Rights Act as applied to the States"); White, supra note 23, at 73. The Supreme Court held in *Strauder v. West Virginia* that the purpose of the Fourteenth Amendment was substantially similar to that of the 1866 Act: "to assure to [Black Americans] the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States." 100 U.S. 303, 306 (1880); see also infra notes 47–48 and accompanying text.

37. Civil Rights Act of 1871, ch. 114, § 18, 16 Stat. 140, 144.

38. See 13 Rev. Stat. § 641 (1875); Amsterdam, Federal Removal, supra note 13, at 827–28 & n.149.

39. See Schmidt, supra note 17, at 1430 n.147 (internal quotation marks omitted) (quoting 13 Rev. Stat. § 641) (comparing the 1866 and 1875 statutes).

40. See Amsterdam, Federal Removal, supra note 13, at 828 & n.150 (tracing the subsequent history of the statute to its current placement in title 28 of the *United States Code*). For the full text of the current version, see supra note 3.

B. *Restriction*

The Supreme Court first construed the civil rights removal statute in 1880.[41] At that time, defendants were required to request removal from the state court, after which they could petition the federal trial court to effect removal by service of process.[42] In *Strauder v. West Virginia* and *Virginia v. Rives*, decided on the same day in opinions authored by Justice William Strong, the Court distinguished two removals in murder trials based on the presence of racially discriminatory juries in the defendants' state forums.[43] The result in the latter decision was a very narrow reading of the statute—requiring a showing of a facially discriminatory state law—that essentially nullified its utility for many parties with federal civil rights defenses.

Taylor Strauder, indicted for murder in a West Virginia court, petitioned before trial for removal of his case to the appropriate federal trial court on the basis that state law prohibited Black men from serving on juries; thus, "he had reason to believe, and did believe, he could not have the full and equal benefit of all laws and proceedings in the State of West Virginia for the security of his person as is enjoyed by white citizens."[44] The state court denied his petition and proceeded with the trial, and the state supreme court affirmed his conviction.[45]

On successful writ of error, the U.S. Supreme Court considered whether every citizen has a right to trial by "a jury selected and impanelled without discrimination against his race or color, because of race or color" and, if so, whether removal is available when a defendant is denied such a right.[46] The Court ruled that West Virginia's exclusion of Black Americans from juries improperly denied them equal protection of the laws in violation of the Fourteenth Amendment.[47] It then affirmed Congress's power to enforce those protections through appropriate legislation,

41. See Virginia v. Rives, 100 U.S. 313 (1880); *Strauder*, 100 U.S. 303.

42. This is the process that led to Supreme Court review in *Rives*. See Amsterdam, Federal Removal, supra note 13, at 845 n.211. Alternatively, a defendant could seek direct Supreme Court review of the state court's ruling, but only after exhausting the state trial and appeals process. See id. This is the process that led to Supreme Court review in *Strauder*. See Collins, Federal Court Intervention, supra note 34, at 78 n.147.

43. For a detailed treatment of the Court's decisions in *Strauder* and *Rives* within the evolution of jury discrimination jurisprudence, see Schmidt, supra note 17, at 1414–55.

44. *Strauder*, 100 U.S. at 304 (internal quotation marks omitted) (quoting Strauder's petition for removal).

45. Id.

46. Id. at 305.

47. See id. at 305–10.

describing removal as "one very efficient and appropriate mode of extending such protection and securing to a party the enjoyment of the right or immunity."[48]

Strauder was the first case in which the Supreme Court held that Black people could not be excluded from juries because of their race.[49] It also clearly endorsed civil rights removal as a procedural tool for the enforcement of federal rights, but it managed to do so without answering the difficult questions of statutory interpretation implicated by the provision.[50] The Court could not avoid those questions in *Rives*, and it answered them "in an offhand, careless way."[51]

Rives involved two Black men indicted for murder in a Virginia court who petitioned for removal to the appropriate federal trial court on the basis that though Virginia's jury selection law was facially neutral, no Black person had ever been allowed to serve on a jury in their county in any case involving Black people; thus, "they were satisfied they could not obtain an impartial trial before a jury exclusively composed of the white race."[52] As in *Strauder*, the state court denied their petitions and proceeded with the trial, which resulted in two convictions.[53]

While the *Rives* Court affirmed that "there can be no reasonable doubt" that Congress may provide for civil rights removal through its Fourteenth Amendment enforcement power, it held that the specific removal provision enacted in the *Revised Statutes* "clearly" does not apply to "all cases in which equal protection of the laws may be denied to a defendant."[54] The Court reasoned, as a matter of statutory interpretation, that no defendant could remove based on an alleged denial of federal rights taking place during judicial proceedings, such as through discrimination in jury selection.[55] Instead, the Court said that the civil

48. Id. at 311. The provisions of the Civil Rights Act of 1866 as reenacted in the *Revised Statutes*, the Court said, "put[] in the form of a statute what had been substantially ordained by the constitutional amendment." Id. at 312. Civil rights removal, in particular, "was an advanced step, fully warranted . . . by the fifth section of the Fourteenth Amendment." Id.; see also U.S. Const. amend. XIV, § 5 (empowering Congress to enforce the Amendment).

49. See Michael J. Klarman, The Racial Origins of Modern Criminal Procedure, 99 Mich. L. Rev. 48, 61 (2000). Later decisions "made such discrimination virtually impossible to prove." Id.; see also Schmidt, supra note 17, at 1462–72 (describing how "the theme of deference to state court factfinding" pervaded Supreme Court adjudication of jury discrimination claims until the 1930s).

50. See Schmidt, supra note 17, at 1432–33; supra note 33 and accompanying text.

51. Schmidt, supra note 17, at 1433.

52. Virginia v. Rives, 100 U.S. 313, 315 (1880).

53. Id. at 316; see also *Strauder*, 100 U.S. at 304.

54. See *Rives*, 100 U.S. at 318–19; supra text accompanying note 39 (providing the text of the provision as codified in the *Revised Statutes*).

55. See *Rives*, 100 U.S. at 319–20 ("When [the defendant] has only an apprehension that such rights will be withheld from him when his case shall come to trial, he cannot affirm that they are actually denied, or that he cannot enforce them. Yet such an affirmation is

rights removal statute applied only amid "a denial of such rights, or an inability to enforce them, resulting from *the Constitution or laws of the State*, rather than a denial first made manifest at the trial of the case."[56] Thus, since Virginia law did not expressly deny the defendants' federal right to jury selection free from discrimination, the defendants did not state a valid basis for removal under the civil rights removal statute.[57]

In limiting civil rights removal jurisdiction to cases arising from state constitutional and statutory law that facially denied federal rights, the Supreme Court retained for itself alone the power of federal review over state judicial and administrative decisions denying such rights.[58] The effect for Black defendants in subsequent decades was generally indistinguishable from the substantive denial of those rights, the exact predicament the Reconstruction Congress sought to prevent by conferring removal jurisdiction on the lower federal courts in 1866.[59] The Court reaffirmed this interpretation of the removal statute several times through the turn of the century,[60] and Congress's elimination of federal appellate review of lower court remand orders in 1887 stripped the Court of most opportunities to reconsider its prior decisions—cementing the restrictive *Strauder–Rives* interpretation for nearly a century.[61]

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essential to his right to remove his case."). For an argument that this interpretation is incorrect, see Schmidt, supra note 17, at 1432–36.

56. *Rives*, 100 U.S. at 319 (emphasis added).

57. See id. at 320–22. This despite nothing in the text of the original or revised removal provision limiting removal to cases involving express statutory denials of federal rights. See 13 Rev. Stat. § 641 (1875) (revised text); Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27, 27 (original text); see also Schmidt, supra note 17, at 1435 (analyzing the text in light of *Rives*).

58. In other words, while defendants claiming a state constitutional or statutory denial of federal rights could seek federal review through civil rights removal, federal appellate review of other forms of state denials of federal rights (e.g., discriminatory enforcement by the executive branch or adjudication by the judicial branch) was possible only by petitioning the Supreme Court after exhausting the state trial and appeals process. See Schmidt, supra note 17, at 1434; supra note 42.

59. See supra notes 34–35 and accompanying text. Schmidt argues that the Court's construction of the removal statute in *Rives* "may well have had a disastrous effect on race relations for more than a half-century by closing federal trial courts to proof of jury discrimination." Schmidt, supra note 17, at 1434.

60. See Kentucky v. Powers, 201 U.S. 1, 30–31 (1906); Williams v. Mississippi, 170 U.S. 213, 225 (1898); Murray v. Louisiana, 163 U.S. 101, 105–06 (1896); Smith v. Mississippi, 162 U.S. 592, 600 (1896); Gibson v. Mississippi, 162 U.S. 565, 582–83 (1896); Bush v. Kentucky, 107 U.S. 110, 115–16 (1883); Neal v. Delaware, 103 U.S. 370, 392–93 (1881). These cases are summarized in Amsterdam, Federal Removal, supra note 13, at 845–50 & n.215.

61. See Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 553. While Supreme Court review technically remained available through appeals of final state judgments, see supra note 42, construction of the removal statute was rarely relevant to the Court's disposition of a case, see Amsterdam, Federal Removal, supra note 13, at 847 n.215, 848 n.217 (describing this issue and explaining that preserving a removal claim "added nothing to other federal claims so preserved"). Indeed, the Court did not address civil rights removal in any cases between its decisions in *Powers*, 201 U.S. 1, and Georgia v. Rachel, 384 U.S. 780 (1966).

II. THE CIVIL RIGHTS MOVEMENT: A STRATEGIC INNOVATION SWIFTLY REVERTED

The Civil Rights Movement of the 1950s and 1960s returned Congress's attention to civil rights legislation for the first time since Reconstruction.[62] Accompanying these new federal civil rights guarantees were innovative procedural tools embraced by civil rights lawyers and federal courts to realize these rights over the resistance of southern state and local governments.[63] Among them was civil rights removal, resurrected by Congress in 1964 and immediately used to shift thousands of prejudicial state prosecutions into a federal forum.[64] But the Supreme Court responded nearly as quickly, dealing a new set of interpretive blows that condemned civil rights removal to another era of "exquisite obscurity."[65]

This Part reveals the story of civil rights removal in the Civil Rights Movement. Section II.A describes Congress's successful effort to revitalize the statute in the Civil Rights Act of 1964. Section II.B conducts a case study of civil rights removal in Mississippi, focusing primarily on the years 1964 through 1966. Incorporating data from thousands of cases removed to federal district courts during that time, this study is the first close examination of the provision's real-world utility during that innovative period. Section II.C then analyzes how the Supreme Court brought that moment to an abrupt end in a pair of cases that adopted an even narrower construction of the removal statute.

A. *Resurrection*

By the 1960s, civil rights removal had spent a century on the books, but there was little to show for it. Lower federal courts had faithfully applied the narrow *Strauder–Rives* doctrine for decades,[66] appellate courts were statutorily barred from reviewing remand orders,[67] and the Supreme Court accordingly encountered no occasion to revisit the statute. In 1964, however, Congress's revived engagement with civil rights legislation

62. See Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86; Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634. The 1957 Act was the first civil rights legislation passed by Congress since the Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

63. On the efforts of civil rights lawyers and Fifth Circuit judges to effect racial integration in the South during the 1950s and 1960s, see generally Jack Bass, Unlikely Heroes (1981).

64. See infra sections II.A–.B.

65. See Amsterdam, Federal Removal, supra note 13, at 843; supra note 32 and accompanying text; infra section II.C.

66. See, e.g., Amsterdam, Federal Removal, supra note 13, at 850 n.222 (collecting more than twenty lower-court cases applying *Rives*).

67. See supra note 61 and accompanying text.

presented an opportunity to revitalize removal at the height of the Civil Rights Movement.

In June 1963, President John F. Kennedy recommended to Congress a legislative package that would eventually become the Civil Rights Act of 1964.[68] The House Judiciary Committee's Civil Rights Subcommittee immediately began hearings on the proposed legislation and reported to the full committee a "considerably more comprehensive" bill in October 1963.[69] Included in that proposal was a new provision that reenabled appellate review of federal trial courts' decisions to remand civil rights cases to state courts.[70] Its backers hoped that this mechanism would lead federal appellate courts to reinterpret the scope of the civil rights removal statute, the actual text of which would not be affected by this legislation.[71] In testimony, Attorney General Robert F. Kennedy expressed strong support for the appeal provision, noting that "the non-appealability of an order of remand has made the [civil rights removal] provision almost useless."[72] The Judiciary Committee reported the bill in November, retaining the appeal provision under Title IX.[73] The provision was not changed during debate and voting on amendments before the full House and Senate, which passed the bill in February and June 1964, respectively.[74] On July 2, the House adopted the Senate's revised bill, and President Lyndon B. Johnson signed the Civil Rights Act into law.[75]

The legislative history reveals substantial support for the appeal provision in both chambers despite vocal resistance by some southern members.[76] Those opposed to the provision criticized, among other

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68. Paul M. Downing, Cong. Rsch. Serv., E185B, The Civil Rights Act of 1964: Legislative History; Pro and Con Arguments; Text 4–8 (1965), https://www.senate.gov/artandhistory/history/resources/pdf/CivilRights_CRSReport1965.pdf [https://perma.cc/YNP4-P8ZA] (providing brief synopses of each title of the proposed bill).

69. Id. at 11.

70. Id. at 12; see also supra note 61 and accompanying text (discussing the 1887 bar on such appeals).

71. See infra notes 79–80 and accompanying text.

72. See Robert F. Kennedy, U.S. Att'y Gen., Statement on H.R. 7152, at 24 (Oct. 15, 1963), https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/10-15-1963.pdf [https://perma.cc/L6UF-4YDK].

73. Downing, supra note 68, at 13, 16.

74. See id. at 16–20 (House proceedings); id. at 23, 31–32 (Senate proceedings).

75. See id. at 32; see also Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

76. See 110 Cong. Rec. 2769–84 (Feb. 10, 1964) (House debate and votes on amendments to the appeal provision). The relevant Senate debate is more scattered. See id. at 14459 (June 19, 1964) (statement of Sen. Morton); id. at 13879–80 (June 16, 1964) (statement of Sen. Byrd and vote on amendment striking appeal provision); id. at 13468 (June 11, 1964) (statement of Sen. Ervin and vote on amendment striking appeal provision); id. at 13172–73 (June 9, 1964) (statement of Sen. Byrd); id. at 11320–21 (May 19, 1964) (statement of Sen. Sparkman); id. at 7784–85 (Apr. 13, 1964) (statement of Sen. Smathers); id. at 6955–56 (Apr. 6, 1964) (statement of Sen. Dodd); id. at 6551 (Mar. 30, 1964) (statement of Sen. Humphrey); id. at 6451 (Mar. 26, 1964) (statement of Sen. Dirksen).

aspects, its "radical departure from traditional legal procedures,"[77] its "handicap" on state and local courts, and the manner in which it would "add immeasurably to existing delay in the enforcement of legal rights."[78] Several members who supported the bill called for federal appellate courts to reinterpret the civil rights removal statute when reviewing remand orders.[79] Reinterpretation was warranted, they argued, to combat modern discriminatory practices not captured by the *Strauder–Rives* doctrine's facial-discrimination requirement.[80]

The passage of the Civil Rights Act of 1964, despite not actually altering the text of the civil rights removal provision, "restored life to a provision of the Civil Rights Act of 1866 which had been virtually invalidated."[81] Almost immediately, appellate courts began to answer Congress's invitation to reinterpret the removal statute, often expanding its reach.[82] The 1964 Act's "specific congressional sanction to an expanded role for the courts of appeals in civil rights matters" stymied the efforts of prejudiced southern district court judges to keep civil rights cases in hostile state courts and "provided a major weapon for scores of civil rights

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77. 110 Cong. Rec. 6451 (Mar. 26, 1964) (statement of Sen. Dirksen). This despite appeals being available before 1887. See supra note 61 and accompanying text.

78. 110 Cong. Rec. 6451 (Mar. 26, 1964) (statement of Sen. Dirksen); see also, e.g., id. at 13172–73 (June 9, 1964) (statement of Sen. Byrd) (similar criticisms); id. at 2771–72 (Feb. 10, 1964) (statement of Rep. Dowdy) (same). The Congressional Research Service summarized arguments against Title IX: The provision "could cause indefinite delay in exercise of jurisdiction by the State court. Local police and courts could not control lawless agitators and protect the rights of others. [It] would also place civil rights litigants at an unfair advantage over other litigants." Downing, supra note 68, at 41.

79. See, e.g., 110 Cong. Rec. 6955 (Apr. 6, 1964) (statement of Sen. Dodd) ("[T]he right to a fair trial free from racial hostility and antagonism should be guaranteed. . . . It is the purpose of title IX to make it possible for the courts to consider whether the removal statute can be given such construction."); id. at 2770 (Feb. 10, 1964) (statement of Rep. Kastenmeier) ("[W]e are . . . asking that the law, frozen as it has been for almost 60 years . . . , be reviewed . . . [and] that the court of appeals be authorized to reinterpret these laws.").

80. Representative Robert Kastenmeier, for example, argued:

> It would seem that under reinterpretation of section 1443 cases involving State criminal prosecution brought to intimidate the petitioner, cases involving such community hostility that a fair trial in the State or local courts is unlikely or impossible, and other such cases . . . might now well be construed to be within the scope of said section. If so, once again we will breathe life into the Civil Rights Acts of 1866 and give meaning to the purpose intended.

110 Cong. Rec. 2770 (Feb. 10, 1964) (statement of Rep. Kastenmeier). The Congressional Research Service identified this as a primary argument in favor of Title IX: Civil rights removal is available "only if State constitutions or laws are alleged to be in violation of the U.S. Constitution. But the present problem is discriminatory application of State constitutions and laws. Federal judges tend now to return these cases to State courts. This title will [enable appellate review of] such remands." Downing, supra note 68, at 40.

81. See Bass, supra note 63, at 253.

82. See U.S. Comm'n on C.R., Law Enforcement: A Report on Equal Protection in the South 132–34 (1965) (summarizing circuit court decisions); infra section II.B.1.

lawyers who came temporarily to the South to fight the court battles that followed."[83] The extent of this removal revolution is revealed in the story of civil rights removal—and the lawyers who seized its moment—during the height of the Civil Rights Movement in Mississippi.

B. *Case Study: Civil Rights Removal in Mississippi, 1964–1966*

In 1964, mass arrests of civil rights demonstrators, refusal of local counsel to represent them, and harsh judgment by state courts imbued with prejudice defined the Mississippi justice system.[84] For defendants, the only hope for real justice was intervention by a perhaps-friendlier federal court.[85] Removal provided that chance, and hundreds embraced the choice to proceed in a federal forum. This section highlights the prevalence of that choice amid the Civil Rights Movement in Mississippi during the mid-1960s. In particular, it explores how lawyers embraced the civil rights removal statute as an innovative procedural tool to place their clients in a favorable forum, overcoming procedural hurdles and unleashing a wave of removals in 1964 that would persist until the Supreme Court once again brought removal's utility to a halt two years later.[86]

This removal phenomenon was not unique to Mississippi. Civil rights lawyers strategically employed removal throughout the South during this period, and there is evidence that it was used in other parts of the nation as well.[87] Indeed, even then-Judge Thurgood Marshall of the U.S. Court of Appeals for the Second Circuit, acting quickly on the Civil Rights Act's renewal of remand-order appealability in 1964, ordered that a federal district court retain jurisdiction over a case involving around fifty defendants arrested during sit-ins at the New York World's Fair.[88] Mississippi is nonetheless an appropriate subject of this study not only because it was arguably

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83. Bass, supra note 63, at 253; see also infra section II.B.2.

84. See supra note 1 and accompanying text.

85. As this case study illustrates, the perhaps-friendlier court was not necessarily the federal district court; many defendants' goal often was to get their case before the civil-rights-favoring U.S. Court of Appeals for the Fifth Circuit. See infra notes 100, 103, and accompanying text; see also Jack Greenberg, Crusaders in the Courts 379 (Twelve Tables Press anniv. ed. 2004) (1994) ("[R]emoval wasn't always desirable. . . . Indeed, apart from [Fifth Circuit judges] Tuttle, Wisdom, Brown, [Alabama district court judge] Johnson, and just a few others, Southern federal judges were indistinguishable from state judges in racial attitude.").

86. See infra section II.C.

87. See Alfred E. Clark, U.S. Judge to Hear Rights Case Here; 50 Fair Pickets Are Seeking Trial in Federal Court, N.Y. Times, Aug. 27, 1964, at 37 (noting removals in New York and that "about 500 similar cases of civil rights protest arrests were pending now in Mississippi, as well as hundreds of others in Alabama, Georgia, Florida, Virginia and North Carolina").

88. See id. The novelty of the removal statute and confusion over its scope during this period also led to situations in which criminal defendants with no apparent civil rights defenses, such as gamblers charged with a criminal conspiracy in New York, invoked removal to move their cases to federal court. See David Anderson, Gamblers Invoke Civil Rights Law;

the epicenter of the Civil Rights Movement during this brief period, the beginning of which coincided with the Freedom Summer project,[89] but also because the wide scope and persistent stalling of removals in the state reflect how civil rights removal's forum-setting potential could not be fully realized without further statutory reform.

The cases and data discussed in this section are the product of an analysis of almost 5,000 criminal cases filed in U.S. District Courts for the Northern and Southern Districts of Mississippi from 1961 through 1969.[90] Of those, more than 1,200 were cases removed from Mississippi state courts, almost all of which were filed between June 1964 and June 1966.[91] Most of the case files that informed this study are available only in their original versions at the National Archives; thousands of these records were digitized for the first time for this Note.[92] As a contribution to the historical record, Appendix A to this Note includes docket information for every criminal case removed from Mississippi state courts during the 1960s.[93]

1. *The Landscape.* — Throughout the early 1960s, thousands of Black Mississippians persisted in their attempts to register to vote despite unrelenting violence and interference by Mississippi law enforcement acting under the guise of facially neutral state laws.[94] The full force of the state justice system stood against these citizens: Peaceful attempts to register often resulted in arrest, jail time, and bail "set in amounts calculated to bankrupt . . . civil rights organizations."[95] White lawyers

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Prosecutors Decry Shifting of Cases to U.S. Courts, N.Y. Times, Oct. 16, 1964, at 29 ("The practice of shifting cases . . . is now commonly followed in Southern states, where civil rights defenders prefer Federal courts to local courts, but legal experts say the law was never intended to be an evasive tactic in the sense in which it is being used here.").

89. See supra note 1.

90. Almost every criminal case filed in Mississippi federal courts during this period is included in this dataset (totaling 4,767 cases), which this Note treats as exhaustive. Missing are cases filed in the Southern District, Meridian Division, before January 3, 1964, and in the Southern District, Hattiesburg Division, after March 25, 1968.

91. See infra Appendix A. Additional data are on file with the *Columbia Law Review*.

92. The case files and related correspondence for *Lefton v. City of Hattiesburg*, discussed in section II.B.1, are digitized and available online through the Wisconsin Historical Society's Freedom Summer Digital Collection. All other dockets, case files, and related information are located at the National Archives at Atlanta and are not currently available online. Digitization of relevant resources for this Note, totaling several thousand pages, took place in Atlanta, Georgia, in 2022 in coordination with an archivist.

93. See supra note 90 for two small gaps in this dataset. The National Archives could not provide original dockets for those periods.

94. See, e.g., U.S. Comm'n on C.R., supra note 82, at 15–42 (describing several outbreaks of racial violence across Mississippi and the ineffectiveness of state and local law enforcement responses); Amsterdam, Federal Removal, supra note 13, at 794–99 (presenting a hypothetical fact pattern representing the typical experience of Black Mississippians attempting to exercise their civil rights).

95. Amsterdam, Federal Removal, supra note 13, at 798–99. The 1965 report of the United States Commission on Civil Rights provides numerous examples of these

generally would not take civil rights cases, and only a handful of Black lawyers were admitted to the Mississippi Bar.[96] For those defendants able to secure representation, years would pass before their cases proceeded through the state court system and perhaps succeeded in securing Supreme Court review.[97]

With local attorneys overwhelmed by cases and sure to face defeat in the state court system, out-of-state civil rights lawyers descended on Mississippi with cutting-edge procedural strategies designed to place scores of Black defendants in a forum more likely to recognize their constitutional defenses: federal court.[98] There was no easy way to do this, but of the three conceivable options (a federal injunction against the prosecution, civil rights removal, and pretrial habeas corpus), removal appeared the most promising.[99] Several problems nevertheless complicated the use of removal as a procedural civil rights tool, including the rights-friendly Fifth Circuit's inability to review remand orders and local district court rules that hindered the practical availability of removal in Mississippi.

The former issue, especially important given the racism of federal district court judges in Mississippi,[100] would be resolved by the passage of

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circumstances. See U.S. Comm'n on C.R., supra note 82, at 60–62 (state legislation); id. at 62–68 (mass arrests); id. at 68–75 (bail); id. at 77–80 (sentencing).

96. See Bass, supra note 63, at 289 (describing "the refusal of the organized bar in the deep South to represent those involved in civil rights cases"); Greenberg, supra note 85, at 375 (noting that many white lawyers would not cooperate on civil rights matters and that "[t]here were only three [B]lack lawyers practicing in Mississippi at that time, Jack Young, Carsie Hall, and R. Jess Brown"); Amsterdam, Federal Removal, supra note 13, at 797 nn.12–13.

97. See Amsterdam, Federal Removal, supra note 13, at 797–99 ("[U]nresolved criminal charges hang over defendants for years, affecting their mobility, their acceptance at educational or other institutions, their eligibility for state benefits such as unemployment compensation, and, most important, their willingness to risk repeated exercise of federally guaranteed rights." (footnotes omitted)).

98. See Bass, supra note 63, at 286 (explaining that the gap left by "the general abdication of the legal profession in the South . . . was filled by lawyers who came in from outside the South to join the handful of [B]lack attorneys in the region and the rare southern white lawyer willing to risk involvement"); Melvyn Zarr, Recollections of My Time in the Civil Rights Movement, 61 Me. L. Rev. 365, 370–72 (2009) ("[W]e quickly agreed that we did not want to submit our clients' fates to the home cooking of the state courts. We had to contrive a way to get these criminal cases into federal court."). LDF attorney–turned–law professor Melvyn Zarr explains how not even the leading casebook on the federal courts at the time, presumably Henry Hart and Herbert Wechsler's *The Federal Courts and the Federal System*, included much detail on routes to federal court for these litigants. Id. at 371.

99. See Fallon et al., supra note 24, at 860 (listing these mechanisms and explaining that removal is ordinarily preferable for a civil rights litigant); Zarr, supra note 98, at 370–71 (describing these three mechanisms and his successful reliance on removal).

100. See Zarr, supra note 98, at 370–71 & nn.14, 17 (describing district court judge William Harold Cox as "a real out-and-out racist" who "would not and did not" grant relief and explaining that the lawyers' goal was therefore to get their litigants before the friendlier Fifth Circuit in New Orleans); see also infra note 103.

the Civil Rights Act of 1964.[101] In fact, the Fifth Circuit had already begun taking appeals by the time of the Act's passage, interpreting the 1887 bar on appeals not to include cases removed under the civil rights removal statute.[102]

The latter issue involved local rules enacted by federal judges in the Southern District of Mississippi,[103] disputes over which culminated in the Fifth Circuit's June 1964 decision in *Lefton v. City of Hattiesburg*.[104] That case involved more than forty members of the Student Nonviolent Coordinating Committee (SNCC), all arrested while engaged in a voter registration drive in Hattiesburg, Mississippi, on April 10, 1964, for violating a state law passed two days earlier that prohibited demonstrations obstructing access to public buildings.[105] The defendants' Louisiana- and New York–based lawyers attempted to file a petition to remove the cases from state court to the U.S. District Court for the Southern District of Mississippi, alleging that the state statute was "vague, indefinite and unconstitutional on its face."[106] But the district court rejected the petition because it did not comply with local rules enacted by Judge Harold Cox in December 1963 requiring for every defendant (1) an individual removal petition and filing fee, (2) a $500 removal bond, and (3) the signature of a local attorney.[107]

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101. See supra section II.A.

102. See U.S. Comm'n on C.R., supra note 82, at 134 n.69; Amsterdam, Federal Removal, supra note 13, at 832 n.173; supra note 61.

103. The Southern District consisted of only two judgeships in the 1960s. One seat was held by Sidney C. Mize from February 1937 until his death in April 1965. Mize, Sidney Carr, Fed. Jud. Ctr., http://www.fjc.gov/history/judges/mize-sidney-carr [https://perma.cc/H8TF-TNXZ] (last visited Sept. 19, 2023). The other seat was held by William H. Cox from June 1961 until he assumed senior status in October 1982. Cox, William Harold, Fed. Jud. Ctr., https://www.fjc.gov/history/judges/cox-william-harold [https://perma.cc/N9W2-QSPA] (last visited Sept. 19, 2023). Judge Mize "fit the mold of southern federal judges who were bent on resistance" to federal enforcement of civil rights, Fred L. Banks, Jr., The United States Court of Appeals for the Fifth Circuit: A Personal Perspective, 16 Miss. Coll. L. Rev. 275, 278 n.15 (1996), and Judge Cox has been described as "possibly the most racist judge ever to sit on the federal bench," see Greenberg, supra note 85, at 345, 375.

104. 333 F.2d 280 (5th Cir. 1964).

105. See id. at 282; see also id. at 282 n.1 (text of the statute).

106. See Petition for Removal para. 3, City of Hattiesburg v. Lefton (S.D. Miss. n.d.), https://content.wisconsinhistory.org/digital/collection/p15932coll2/id/5896 (on file with the *Columbia Law Review*). The case has no docket number or filing date because the district court never docketed it.

107. See *Lefton*, 333 F.2d at 282–83. The Northern District had no such rules governing removal procedures. See Memorandum by Benjamin E. Smith at 3, *Lefton*, 333 F.2d 280 (No. 21441), https://content.wisconsinhistory.org/digital/collection/p15932coll2/id/5965 (on file with the *Columbia Law Review*); see also Greenberg, supra note 85, at 375 ("[F]ederal judges Cox and Mize required out-of-state lawyers to appear with local counsel, although [Northern District] Judge Claude Clayton let in those who were admitted in other federal courts."). Still, that district did not see waves of removals until around the passage of the 1964 Civil Rights Act. See infra Appendix A. Without the Fifth Circuit's actions in *Lefton*, it

The defendants' lawyers, arguing that Judge Cox enacted the rules to "assist the steel hard policy of racial segregation in the State of Mississippi and to prevent access to the Federal Courts by individuals who have been wrongfully arrested and charged under statutes which violate the Federal Constitution and its amendments,"[108] sought a writ of mandamus from the Fifth Circuit to compel the district court to file the cases.[109] The circuit court issued a per curiam opinion three days later in which it agreed that the local rules requiring individual filings and bonds appeared to conflict with the federal statutory removal procedures in 28 U.S.C. § 1446; it also advised that no district court may "close its doors" to these litigants if local counsel were unavailable.[110] This guidance angered the district court[111] and sparked hope for civil rights lawyers eager to use removal as a litigation tool across the South.[112]

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is doubtful that the Southern District would have experienced similar removal waves. See infra section II.B.2.

108. See Memorandum by Bruce C. Waltzer, *Lefton*, 333 F.2d 280 (No. 21441), https://content.wisconsinhistory.org/digital/collection/p15932coll2/id/5929 (on file with the *Columbia Law Review*).

109. See Alternative Petition for a Writ of Mandamus, *Lefton*, 333 F.2d 280 (No. 21441), https://content.wisconsinhistory.org/digital/collection/p15932coll2/id/5912 (on file with the *Columbia Law Review*); see also Affidavit of William M. Kunstler, *Lefton*, 333 F.2d 280 (No. 21441), https://content.wisconsinhistory.org/digital/collection/p15932coll2/id/5887 (on file with the *Columbia Law Review*). The petition and accompanying affidavit argued that the district court's local rules conflicted with title 28 of the *United States Code* and the Federal Rules of Civil Procedure.

110. See Per Curiam Opinion on Petition for Writ of Mandamus, *Lefton*, 333 F.2d 280 (No. 21441), https://content.wisconsinhistory.org/digital/collection/p15932coll2/id/5930 (on file with the *Columbia Law Review*). The full text of the Fifth Circuit's opinion is copied at *Lefton*, 333 F.2d at 283 n.3. The court did not formally rule on the petition but simply informed the parties of its position on the matter and laid out what additional briefing would be necessary for it to grant the petition. Still, the opinion received national coverage. See U.S. Court's Rules Upset on Appeal; Basis Voided in Barring of Mississippi Rights Case, N.Y. Times, Apr. 19, 1964, at 65.

111. The tone of Judge Cox's correspondence with the Fifth Circuit devolved over time. Compare Letter from William Harold Cox, J., S.D. Miss., to Richard T. Rives, Griffin B. Bell & J. Skelly Wright, JJ., 5th Cir., at 4 (Apr. 18, 1964), https://content.wisconsinhistory.org/digital/collection/p15932coll2/id/7116 (on file with the *Columbia Law Review*) ("Please excuse the desultory nature of this letter, and its inordinate length, but it involves a matter very important to this district . . . ."), with Letter from William Harold Cox, J., S.D. Miss., to Richard T. Rives, Griffin B. Bell & J. Skelly Wright, JJ., 5th Cir., at 3 (May 2, 1964), https://content.wisconsinhistory.org/digital/collection/p15932coll2/id/7121 (on file with the *Columbia Law Review*) ("[T]his court has given an advisory opinion in a phantom case where it has no jurisdiction of any of the parties.").

112. See Memorandum from Kunstler Kunstler & Kinoy and Smith, Waltzer, Jones & Peebles (Apr. 17, 1964), https://content.wisconsinhistory.org/digital/collection/p15932coll2/id/7115 (on file with the *Columbia Law Review*) (circulating the per curiam opinion and underlying removal petition due to its importance to "civil rights litigation in Mississippi and other states of the South" and explaining how the opinion "disposes of serious procedural obstacles to federal civil rights litigation").

After further briefing, the Fifth Circuit affirmed its views on the bond and local-attorney requirements in a formal decision issued on June 5, 1964.[113] It upheld the district court's individual-petition requirement, setting attorneys on a race to locate each defendant-petitioner—including several ministers who had since left the area—and secure their signature on a boilerplate removal petition.[114] The successful petitions resulted in the removal of thirty-seven cases to the Southern District's Hattiesburg Division between June 26 and July 10, 1964, the start of a tidal wave of civil rights removals across Mississippi in the months to come.[115]

2. *The Moment.* — With local procedural hurdles extinguished and the Civil Rights Act's promise of broader appellate interpretation just around the corner, prominent civil rights lawyers immediately embraced civil rights removal as a strategic litigation tool. The very first batch of post-*Lefton* removals—seventy-four cases—was filed in Jackson only six days after the Fifth Circuit's decision. The lawyers? Jack Greenberg, Constance Baker Motley, and Derrick Bell.[116]

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113. See *Lefton*, 333 F.2d 280. The court found the individual-petition requirement to be within the district court's discretion, "assuming that such a requirement d[id] not so delay matters as to operate to deprive the petitioners of effective access to the federal courts." See id. at 284–85. On the local-attorney requirement, the court said that "where local counsel are associated in the case to comply with court rules, non-local counsel chosen by the parties may nevertheless take the lead" and "waiver of local rules, or admission to the bar *pro hac vice*, should be allowed when, as herein alleged, the non-local counsel 'was unable to find counsel admitted [locally] who would sign the pleadings with him.'" Id. at 285–86 (alteration in original) (quoting Affidavit of Benjamin E. Smith, *Lefton*, 333 F.2d 280 (No. 21441), https://content.wisconsinhistory.org/digital/collection/p15932coll2/id/5918 (on file with the *Columbia Law Review*)).

114. See Letter from William Harold Cox, J., S.D. Miss., to Dixon L. Pyles (June 8, 1964), https://content.wisconsinhistory.org/digital/collection/p15932coll2/id/7131 (on file with the *Columbia Law Review*) (setting a seven-day deadline for securing each defendant-petitioner's signature); Letter from Benjamin E. Smith to Dixon Pyles (June 12, 1964), https://content.wisconsinhistory.org/digital/collection/p15932coll2/id/7132 (on file with the *Columbia Law Review*) (describing the drafting of the petition and struggle to locate out-of-state petitioners); Letter from Sheila Michaels to Dixon Pyles (June 18, 1964), https://content.wisconsinhistory.org/digital/collection/p15932coll2/id/7135 (on file with the *Columbia Law Review*) (civil rights organizer providing update on work of "the law students project" to track down petitioners).

115. See, e.g., Petition for Removal, Mississippi v. Hartfield, No. 1305 (S.D. Miss. filed June 26, 1964) (on file with the *Columbia Law Review*), and similar petitions filed in Nos. 1306–1341. Indeed, by the time the *Lefton* petitions were filed, almost 100 other removals had taken place across the district. See Petition for Removal, Crawford v. Mississippi, No. 3511 (S.D. Miss. filed June 22, 1964) (on file with the *Columbia Law Review*), and similar petitions filed in Nos. 3512–3522; Petition for Removal, Brown v. City of Meridian, No. 5151 (S.D. Miss. filed June 16, 1964) (on file with the *Columbia Law Review*), and similar petitions filed in Nos. 5152–5160; Petition for Removal, Austin v. Mississippi, No. 3437 (S.D. Miss. filed June 11, 1964) (on file with the *Columbia Law Review*) [hereinafter *Austin* Petition for Removal], and similar petitions filed in Nos. 3438–3510.

116. See *Austin* Petition for Removal, supra note 115, and similar petitions filed in Nos. 3438–3510. The local lawyers representing these petitioners were Carsie A. Hall and Jack H. Young. See, e.g., *Austin* Petition for Removal, supra note 115; see also Greenberg,

Jack Greenberg, successor to Thurgood Marshall as Director-Counsel of the NAACP Legal Defense and Education Fund, Inc. (LDF), was a pioneering civil rights litigator who argued several landmark cases before the U.S. Supreme Court during his career, including *Brown v. Board of Education* and *Griggs v. Duke Power Co.*[117] He led LDF for more than two decades and described the genius of its legal team as having "the ability to be creative in matters of legal and social justice."[118] He was listed as counsel for 250 removed cases in Mississippi during the 1960s.[119]

At the time of these removals, Constance Baker Motley was already serving as the first Black woman in the New York Senate.[120] During her two-decade career as a civil rights litigator with LDF, she argued ten cases before the U.S. Supreme Court and led the litigation that resulted in James Meredith's admission to the University of Mississippi.[121] In 1966, she became the first Black woman appointed as a federal judge.[122] She was listed as counsel for 153 removed cases.[123]

Derrick Bell oversaw more than 300 school desegregation cases in Mississippi during his time at LDF, and he would go on to become the first tenured Black professor at Harvard Law School.[124] His scholarship,

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supra note 85, at 368 (describing these lawyers' work in coordination with the NAACP Legal Defense and Education Fund); supra note 96.

117. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Brown v. Bd. of Educ., 347 U.S. 483 (1954); see also Theodore M. Shaw, Tribute to Jack Greenberg, 117 Colum. L. Rev. 1057, 1059–62 (2017); Richard Severo & William McDonald, Jack Greenberg, A Courthouse Pillar of the Civil Rights Movement, Dies at 91, N.Y. Times (Oct. 12, 2016), https://www.nytimes.com/2016/10/13/us/jack-greenberg-dead.html (on file with the *Columbia Law Review*) (last updated Oct. 19, 2016); Jack Greenberg, Colum. L. Sch., https://www.law.columbia.edu/faculty/jack-greenberg [https://perma.cc/CP3V-SKFW] (last visited Sept. 19, 2023). For Greenberg's own reflections on his work, see generally Greenberg, supra note 85.

118. Severo & McDonald, supra note 117 (internal quotation marks omitted) (quoting Greenberg); see also Steven L. Winter, Jack!, 117 Colum. L. Rev. 1069, 1072 (2017) ("Jack was a great legal tactician. Sometimes on a grand scale. Following the trail blazed by Charles Hamilton H[o]uston and Thurgood Marshall, LDF didn't just bring cases; it engaged in well-planned campaigns.").

119. Data on file with the *Columbia Law Review*. Greenberg was likely involved in many more cases; often only local counsel, see supra note 116, were listed on the dockets.

120. See Douglas Martin, Constance Baker Motley, Civil Rights Trailblazer, Dies at 84, N.Y. Times (Sept. 29, 2005), https://www.nytimes.com/2005/09/29/nyregion/constance-baker-motley-civil-rights-trailblazer-dies-at-84.html (on file with the *Columbia Law Review*) (last updated Oct. 5, 2005). For a recent biography of Motley, see generally Tomiko Brown-Nagin, Civil Rights Queen: Constance Baker Motley and the Struggle for Equality (2022).

121. Martin, supra note 120. For an overview of Motley's work on Meredith's case, see generally Denny Chin & Kathy Hirata Chin, Constance Baker Motley, James Meredith, and the University of Mississippi, 117 Colum. L. Rev. 1741 (2017).

122. See Raymond J. Lohier, Jr., On Judge Motley and the Second Circuit, 117 Colum. L. Rev. 1803, 1805 (2017).

123. Data on file with the *Columbia Law Review*. Motley was likely involved in many more cases. See supra note 119.

124. See Fred A. Bernstein, Derrick Bell, Law Professor and Rights Advocate, Dies at 80, N.Y. Times (Oct. 6, 2011), https://www.nytimes.com/2011/10/06/us/derrick-bell-

developed over the course of several decades, included standard law school texts on race and the law and pioneering efforts in critical race theory.[125] He was listed as counsel for 143 removed cases.[126]

Also on the cases were law professor Anthony G. Amsterdam and LDF lawyer Melvyn Zarr, who traveled to Mississippi on a request from Congress of Racial Equality (CORE) field-worker Michael Schwerner to assist the legal response to the jailing of CORE voting rights volunteers during the Freedom Summer project.[127] Amsterdam was a driving force behind the removal strategy, authoring the definitive scholarly treatment of the civil rights removal statute as well as a detailed litigation reference handbook for lawyers working in coordination with LDF in the South.[128] Almost every case among the hundreds removed between 1964 and 1966 involved various out-of-state counsel and the same handful of local counsel listed on each petition.[129]

Together with local counsel, LDF represented in this first batch of removed cases a group of individuals arrested while attempting to register to vote in Canton, Mississippi.[130] After gathering at the Mount Zion Baptist Church, the prospective registrants proceeded in small groups from the church to the local courthouse, but they were stopped by police—already assembled with a truck for arrests—within blocks of the church lot.[131] They were then arrested and taken away, one group after the other, and charged with various misdemeanors such as picketing and parading without a permit.[132] The local counsel, one of only three members of the Mississippi Bar willing to represent criminal defendants in civil rights cases at the time,

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pioneering-harvard-law-professor-dies-at-80.html (on file with the *Columbia Law Review*) (last updated Oct. 11, 2011).

125. See id.; see also, e.g., Derrick A. Bell, Jr., Case Comment, *Brown v. Board of Education* and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518 (1980).

126. Data on file with the *Columbia Law Review*. Bell was likely involved in many more cases. See supra note 119.

127. See Greenberg, supra note 85, at 369–70; Zarr, supra note 98, at 370–71 & n.12; supra note 1. Members of the Ku Klux Klan murdered Schwerner and activists James Chaney and Andrew Goodman on June 21, 1964. See Douglas O. Linder, Bending Toward Justice: John Doar and the "Mississippi Burning" Trial, 72 Miss. L.J. 731, 742–44 (2002). Their deaths drew national attention to the events of the summer of 1964 in Mississippi, and in what became known as the Mississippi Burning trial, Judge Cox presided over the prosecution of nineteen defendants charged by federal prosecutors with the crime. See id. at 749, 755–58.

128. See Anthony G. Amsterdam, The Defensive Transfer of Civil Rights Litigation From State to Federal Courts (n.d.) (reference handbook); Amsterdam, Federal Removal, supra note 13 (law review article).

129. Data on file with the *Columbia Law Review*.

130. See *Austin* Petition for Removal, supra note 115, and similar petitions filed in Nos. 3438–3510. These facts are alleged in each removal petition.

131. See *Austin* Petition for Removal, supra note 115, at 3.

132. See id. at 3–4, 6–7.

was repeatedly denied access to the defendants in jail, who were held under "excessive, exorbitant and discriminatory bail."[133]

The defendants were released on bond upon the removal of their cases to the Southern District of Mississippi; after briefing and a hearing on the matter, Judge Cox issued a five-page opinion and order remanding the cases, concluding that "no fact or circumstance" brought them under any removal statute.[134] As authorized by the Civil Rights Act, petitioners appealed to the Fifth Circuit, which reversed in light of its interpretation of the civil rights removal statute in *Rachel v. Georgia*.[135] In that case (one of many broader interpretations of the removal statute by appellate courts amid the renewed appealability of remand orders[136]), the Fifth Circuit ruled that a district court must judge the adequacy of a removal petition's facts consistent with the notice-pleading standard then applied to other forms of pleading under federal rules.[137] With the appeal of that case pending before the Supreme Court, the Fifth Circuit ordered the district court to stay the proceedings until the high court's decision.[138]

The journey of that litigation—the arrest of people exercising their civil rights, their release upon the removal of their case to federal court, the remand of their case after extensive hearings, the appeal of the remand order to the Fifth Circuit, and the staying of further proceedings pending the Supreme Court's 1966 decisions on civil rights removal—is typical of hundreds of cases in Mississippi during the mid-1960s.[139]

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133. See id. at 2, 12. Bail reduction was a common component of the removal strategy. See, e.g., Sally Belfrage, Freedom Summer 132 (1965) ("While Claude Clayton, the federal judge for the northern half of the state, moved from town to town, the lawyers chased him with their documents and attempted to persuade him to grant the petitions [for removal] and lower excessive bail."). For Sally Belfrage's account of her experience in a Mississippi jail during Freedom Summer, see id. at 137–61.

134. See Opinion & Order on Motion to Remand at 4, Austin v. Mississippi, No. 3437 (S.D. Miss. remanded Oct. 20, 1964) (on file with the *Columbia Law Review*).

135. See McGee v. City of Meridian, 359 F.2d 846, 847 (5th Cir. 1966); Rachel v. Georgia, 342 F.2d 336, 339–42 (5th Cir. 1965). Amsterdam represented these petitioners on appeal.

136. See, e.g., Cox v. Louisiana, 348 F.2d 750, 754–55 (5th Cir. 1965); Peacock v. City of Greenwood, 347 F.2d 679, 682–84 (5th Cir. 1965); *Rachel*, 342 F.2d at 340–43. But see New York v. Galamison, 342 F.2d 255, 270–72 (2d Cir. 1965) (declining to reexamine the "restriction that had been judicially imposed on the first clause" of the removal statute and adopting a narrow construction of the second clause). These cases are summarized by the United States Commission on Civil Rights. U.S. Comm'n on C.R., supra note 82, at 132–35 ("These decisions indicate that the Federal courts have begun the process of reconsidering the earlier restrictive interpretations of section 1443, a step forward that Congress anticipated in 1964.").

137. See *Rachel*, 342 F.2d at 340. Thus, because in these cases Judge Cox had not conducted an evidentiary hearing on the matter before remanding, his remand order was in error. *McGee*, 359 F.2d at 847.

138. See *McGee*, 359 F.2d at 847; infra section II.C (discussing the Supreme Court's 1966 decisions).

139. See, e.g., Docket, Allen v. Mississippi, No. 3733 (S.D. Miss. filed Apr. 23, 1965) (on file with the *Columbia Law Review*), and similar dockets in Nos. 3734–3806; Docket, Kaslo v.

Especially striking are the hurdles that hindered civil rights removal's effectiveness even after *Lefton* and liberal appellate interpretations. Cases

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Mississippi, No. 5219 (S.D. Miss. filed Mar. 2, 1965) (on file with the *Columbia Law Review*), and similar dockets in Nos. 5220–5234; Docket, Parker v. City of Pascagoula, No. 8358 (S.D. Miss. filed Aug. 13, 1964) (on file with the *Columbia Law Review*), and similar dockets in Nos. 8359–8426; Docket, Miller v. Mississippi, No. 8353 (S.D. Miss. filed July 14, 1964) (on file with the *Columbia Law Review*), and similar dockets in Nos. 8354–8355; Docket, Brown v. City of Meridian, No. 5151 (S.D. Miss. filed June 16, 1964) (on file with the *Columbia Law Review*), and similar dockets in Nos. 5152–5160.

Judge Cox criticized the quantity and quality of these cases in a letter to removal attorneys that also illustrates the (often-unsuccessful) role of bond reduction in the attorneys' removal strategy:

> Both of [the defendants] filed petitions to remove [perjury] prosecutions to the United States District Court for the Hattiesburg Division of this District. Their applications were made to the Court under the rules to reduce the bonds of these petitioners. The bond of petitioner (Hancock) was not changed from $5000 as fixed by the State Judge, but the bond of petitioner (Glenn) was reduced to $3500 by reason of facts and circumstances in each case which prompted such decision. Hancock was released on cash bond on November 4, 1964. Glenn was released on cash bond on September 11, 1964.
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> . . . .
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> Actually civil rights and the magic word segregation are not in any wise involved in any of these proceedings, but are obviously inserted in these petitions as ad hominem arguments to the Court in search of an ear radically attuned to such wave length. . . . It is significant to the Court that so many petitions in substantially the same wording, and appearing to have the same author, constantly appear before this Court to be made in loose fashion under oath with no substantial evidentiary support therefor.

Letter from Harold Cox, J., S.D. Miss., to James Finch & Leonard H. Rosenthal (Nov. 19, 1964) (on file with the *Columbia Law Review*) (discussing Mississippi v. Hancock, No. 1342 (S.D. Miss. filed July 13, 1964), and Mississippi v. Glenn, No. 1344 (S.D. Miss. filed Aug. 6, 1964)). The defendant in *Hancock*, a Freedom Summer volunteer working with SNCC, alleged in his removal petition that he was arrested and charged with perjury "in filling out a sworn written application for registration as a voter"; that the arrest "was solely for the purpose of discouraging and preventing him and other [Black people] in the State of Mississippi from registering to vote"; and that "[i]n furtherance of this purpose . . . Petitioner's bail ha[d] been set at the exorbitant and unreasonable amount of $5,000, and he ha[d] been incarcerated since April 10, 1964, without a trial date having been set and without a grand jury even having been impaneled to consider his alleged offense." See Petition for Removal and for Other Relief at B-1, *Hancock*, No. 1342 (S.D. Miss. filed July 13, 1964) (on file with the *Columbia Law Review*). Five thousand dollars in April 1964 is equivalent to about fifty thousand dollars today. See CPI Inflation Calculator, Bureau of Lab. Stat., https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=5000&year1=196404&year2=202312 [https://perma.cc/2H8L-4WXK] (last visited Jan. 11, 2024).

An example of a Fifth Circuit order reversing the district court's remand and staying proceedings pending the outcome of the Supreme Court cases is Kaslo v. City of Meridian, 360 F.2d 282 (5th Cir. 1966). Often the district court would stay its own remand orders pending disposition of relevant appeals before the Fifth Circuit. See, e.g., Order, Mississippi v. Brumfield, Nos. 3734–3806, 3819 (S.D. Miss. filed June 21, 1965) (on file with the *Columbia Law Review*) (staying in a single order the remand orders in seventy-four listed cases); Order, Reeves v. City of Pascagoula, Nos. 8359–8426 (S.D. Miss. filed June 12, 1965) (on file with the *Columbia Law Review*) (staying sixty-eight remand orders at once).

did not simply proceed as usual upon removal to federal court; rather, what regularly followed was a drawn-out process to adjudicate the validity of the removal, often involving several affidavits,[140] extensive briefing,[141] and numerous hearings that included testimony from state government officials.[142] The proper scope of the removal statute was in flux, and on appeal, the Fifth Circuit had little room to employ its view of the statute

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140. See, e.g., Affidavit of Selby Bowling, President of the Bd. of Supervisors of Forrest Cnty., Miss., *Hancock*, No. 1342 (S.D. Miss. filed Aug. 31, 1964) (on file with the *Columbia Law Review*); Affidavit of James Dukes, Prosecuting Att'y of Forrest Cnty., Miss., *Hancock*, No. 1342 (S.D. Miss. filed Aug. 31, 1964) (on file with the *Columbia Law Review*); Affidavit of Clyde W. Easterling, Chancery Clerk of Forrest Cnty., Miss., *Hancock*, No. 1342 (S.D. Miss. filed Aug. 31, 1964) (on file with the *Columbia Law Review*); Affidavit of James Finch, Dist. Att'y for Twelfth Jud. Dist. of the State of Miss., *Hancock*, No. 1342 (S.D. Miss. filed Aug. 31, 1964) (on file with the *Columbia Law Review*); Affidavit of W.G. Gray, Sheriff of Forrest Cnty., Miss., *Hancock*, No. 1342 (S.D. Miss. filed Aug. 31, 1964) (on file with the *Columbia Law Review*); Affidavit of Theron C. Lynd, Cir. Clerk of Forrest Cnty., Miss., *Hancock*, No. 1342 (S.D. Miss. filed Aug. 31, 1964) (on file with the *Columbia Law Review*). The *Hancock* docket indicates that depositions of half of these officials were taken on December 28, 1964. For additional examples of the use of affidavits in removal adjudications, see, e.g., Affidavit of Joe N. Pigott, Dist. Att'y for Pike Cnty., Miss., Parker v. Mississippi, No. 3629 (S.D. Miss. filed Jan. 27, 1965) (on file with the *Columbia Law Review*); Affidavit of R.R. Warren, Sheriff of Pike Cnty., Miss., *Parker*, No. 3629 (S.D. Miss. filed Jan. 27, 1965) (on file with the *Columbia Law Review*); Affidavit of H.G. Hause, Captain of Police & Chief Clerk of Mun. Ct. of City of Jackson, Miss., Poole v. City of Jackson, No. 3393 (S.D. Miss. filed Oct. 25, 1963) (on file with the *Columbia Law Review*).

141. See, e.g., Petitioner's Brief in Opposition to Respondent's Motion to Remand, City of Meridian v. Golick, No. 5210 (S.D. Miss. n.d.) (on file with the *Columbia Law Review*) (brief by Jack Greenberg's team opposing remand); Brief for Movant, *Golick*, No. 5210 (S.D. Miss. n.d.) (on file with the *Columbia Law Review*) (brief by the City of Meridian supporting remand); see also, e.g., Petitioners' Memorandum in Support of Their Petitions for Removal, City of Meridian v. Smith, No. 5240 (S.D. Miss. filed Apr. 11, 1966) (on file with the *Columbia Law Review*); Memorandum Brief on Behalf of the City of Meridian, *Smith*, No. 5240 (S.D. Miss. filed Apr. 11, 1966) (on file with the *Columbia Law Review*). The city and petitioners filed identical briefs in City of Meridian v. Harris, No. 5243 (S.D. Miss. filed Apr. 11, 1966) (on file with the *Columbia Law Review*), City of Meridian v. Sours, No. 5242 (S.D. Miss. filed Apr. 11, 1966) (on file with the *Columbia Law Review*), and City of Meridian v. Sumrall, No. 5241 (S.D. Miss. filed Apr. 11, 1966) (on file with the *Columbia Law Review*).

142. See, e.g., Subpoena of Roy K. Moore, Agent in Charge of Jackson, Miss., Off. of the FBI, City of McComb v. Lee, No. 3589 (S.D. Miss. Oct. 13, 1964) (on file with the *Columbia Law Review*); Subpoena of "Bud" Gray, Sheriff of Forrest Cnty., Miss., Mississippi v. Hartfield, No. 1305 (S.D. Miss. Aug. 4, 1964) (on file with the *Columbia Law Review*); Subpoena of Clyde W. Easterling, Chancery Clerk of Forrest Cnty., Miss., *Hartfield*, No. 1305 (S.D. Miss. Aug. 4, 1964) (on file with the *Columbia Law Review*); List of Exhibits and Witnesses, *Poole*, No. 3393 (S.D. Miss. Oct. 25, 1963) (on file with the *Columbia Law Review*) (listing as a witness "Allen Thompson, Mayor of the City of Jackson, Mississippi"); Transcript at 2, Brown v. Mississippi, No. 3196 (S.D. Miss. Aug. 14, 1961) (on file with the *Columbia Law Review*) (listing as appearing attorney "Joe T. Patterson, Esq., Attorney General, State of Mississippi"); see also, e.g., Transcript, Mississippi v. Miller, No. 8353 (S.D. Miss. Sept. 21, 1964) (on file with the *Columbia Law Review*) (more-than-250-page hearing transcript); Transcript, *Poole*, No. 3393 (S.D. Miss. Jan. 8, 1964) (on file with the *Columbia Law Review*) (nearly 200-page hearing transcript).

because proceedings in most removed cases were stayed pending the outcomes of the cases before the Supreme Court.

Of the 2,297 criminal cases filed in federal courts in Mississippi from 1964 through 1966, removals under 28 U.S.C. § 1443 accounted for 1,136 (49.5%).[143] Indeed, civil rights removals accounted for 1,114 of 1,871 criminal cases (59.5%) filed between the Fifth Circuit's decision in *Lefton* (June 1964) and the Supreme Court's decisions in *Rachel* and *Peacock* (June 1966). During the three preceding years (1961–1963), the same federal courts saw 8 removals out of 1,315 criminal cases (0.6%). During the three subsequent years (1967–1969), there were 1,155 criminal cases and 57 removals (4.9%). The overall number of criminal cases in Mississippi federal courts practically doubled from 1964 through 1966 compared to the three-year periods before and after. The Southern District in particular saw 715 removals among 1,337 criminal cases from 1964 through 1966, of which 623 were remanded. Almost all remanded cases were appealed: 432 appeals were docketed, and most remaining cases were stayed pending the resolution of a related appeal. Of those 432, the Fifth Circuit dismissed 58 cases and held 374 pending the Supreme Court's decisions.

After the Supreme Court's very narrow rulings in June 1966, discussed in section II.C, the Fifth Circuit affirmed the district court's remand orders in all 374 cases, sending each one back to state court.[144] There, prejudicial procedures and unfriendly juries likely nullified any sense of justice that those defendants might have enjoyed in a federal forum had the hope Congress breathed into the removal statute resulted in a stable, easily applied tool for civil rights litigants.[145] Instead, without clear direction, that breath of hope prompted widespread confusion, significant disputes, and an overwhelming caseload that created chaos in the lower courts.

C. *Restriction Restored*

The Supreme Court's first chance to review the civil rights removal statute amid this revolution in civil rights lawyering brought removal's moment to a crashing halt, ending lower-court chaos but also eliminating removal's potential as a prejudice-checking civil rights tool. Congress openly anticipated reconsideration of the *Strauder–Rives* doctrine when it reinstated appellate review of civil rights remand orders in 1964,[146] and the

143. See infra Appendix A. Additional data underlying the statistics in this paragraph are on file with the *Columbia Law Review*.

144. Data on file with the *Columbia Law Review*; see also, e.g., Lee v. City of McComb, No. 22751 (5th Cir. Nov. 15, 1966) (on file with the *Columbia Law Review*) (affirming district court's remand order in a one-sentence decision "[o]n the authority of *The City of Greenwood vs. Peacock*, 384 U.S. 808"), aff'g Order, *Lee*, No. 3589 (S.D. Miss. filed Oct. 7, 1964) (on file with the *Columbia Law Review*).

145. See supra notes 95–97 and accompanying text.

146. See Amsterdam, Federal Removal, supra note 13, at 911; supra section II.A.

question landed before the Court within two years.[147] In *Georgia v. Rachel* and *City of Greenwood v. Peacock*, decided on the same day in opinions authored by Justice Potter Stewart, the Court distinguished two removal attempts involving groups of Black defendants seeking service at restaurants and engaging in voter registration activities, respectively.[148] The result was an interpretation of the statute just as narrow as the Court's 1880 decisions, nullifying the statute's utility once again less than two years after its revitalization.

Thomas Rachel and nineteen others were indicted under a Georgia criminal trespass statute after they were denied service at Atlanta restaurants open to the public and refused to leave.[149] They removed their cases to the Northern District of Georgia under the civil rights removal statute, and the Fifth Circuit upheld the removals in light of the Civil Rights Act of 1964, a federal "law providing for . . . equal civil rights."[150]

Reviewing that decision, the Supreme Court conducted a detailed analysis of the removal statute's development and its nineteenth-century interpretations.[151] Summarizing with apparent approval *Strauder*, *Rives*, and their progeny, the Court resolved not to revisit what it means to be denied or unable to enforce one's rights,[152] but it did address for the first

147. See City of Greenwood v. Peacock, 384 U.S. 808 (1966); Georgia v. Rachel, 384 U.S. 780 (1966). These cases, both appeals from Fifth Circuit decisions, involved the Court's first review of the civil rights removal statute in sixty years. See supra notes 60–61 and accompanying text.

148. See *Peacock*, 384 U.S. at 810–14 (summarizing relevant facts); *Rachel*, 384 U.S. at 782–85 (same). Note the parallel to *Strauder* and *Rives*, another pair of distinguishable removal cases decided on the same day in opinions authored by the same Justice in which the Court imposed severe, long-lasting limitations on civil rights removal's practical utility. See supra section I.B.

149. *Rachel*, 384 U.S. at 782–83.

150. See Rachel v. Georgia, 342 F.2d 336, 342–43 (5th Cir. 1965) (internal quotation marks omitted) (quoting 28 U.S.C. § 1443(1) (1964)). The Supreme Court had ruled in Hamm v. City of Rock Hill, 379 U.S. 306 (1964), that the Civil Rights Act of 1964 "precludes state trespass prosecutions for peaceful attempts to be served upon an equal basis in establishments covered by the Act." *Rachel*, 384 U.S. at 785.

151. See *Rachel*, 384 U.S. at 786–804.

152. See id. at 794–804. The Court seemed to justify retaining the *Strauder*–*Rives* doctrine based on the lack of substantive changes to the statute since those decisions. See id. at 802 ("[F]or the purposes of the present case, we are dealing with the same statute that confronted the Court in the cases interpreting [13 Rev. Stat.] § 641.").

The Court did read one sentence in *Rives* to suggest that a defendant can show denial on some basis "equivalent" to a facially discriminatory state law. See id. at 804. This indication is found in the *Rives* Court's assertion that the denial of rights within the meaning of the removal provision "is primarily, *if not exclusively*, a denial . . . resulting from the Constitution or laws of the State." See id. (internal quotation marks omitted) (quoting Virginia v. Rives, 100 U.S. 313, 319 (1880)). But the *Rachel* Court provided no explanation of what that basis might look like beyond the "narrow circumstances" of the present case, in which it ruled that the Civil Rights Act of 1964's explicit "'substitut[ion] [of] a right for a crime'" made prosecution of the defendants under the Georgia trespass statute—though

time which rights in particular enable civil rights removal. Narrowly construing the statute's language and legislative history, the Court ruled that the only "law[s] providing for equal civil rights" that may enable removal under this statute are those "providing for specific civil rights stated in terms of racial equality."[153] As a result, no party may trigger civil rights removal based on the denial of constitutional rights because "the guarantees of those clauses are phrased in terms of general application available to all persons or citizens, rather than in the specific language of racial equality that § 1443 demands."[154] Any federal civil rights statute addressing concerns other than race, many of which Congress enacted after this decision, suffers the same fate.[155]

Peacock likewise answered Congress's call to revitalize civil rights removal by reaffirming the *Strauder–Rives* doctrine. The case involved a series of removals by two groups of defendants who alleged that they were denied or could not enforce their federal rights in Mississippi state courts.[156] The first group included fourteen individuals engaged in a voter registration drive who were confronted and charged with obstructing public streets in the City of Greenwood.[157] The second group consisted of fifteen people who claimed that their arrests and various charges were for the "sole purpose and effect of harassing Petitioners and of punishing them for and deterring them from the exercise of their constitutionally protected right to protest the conditions of racial discrimination and segregation" in Mississippi.[158] In both instances, the Northern District of Mississippi remanded the cases back to state court, and the Fifth Circuit reversed on the ground that removal was proper on allegations of the

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not discriminatory on its face—a denial of that federal right. See id. at 804–05 (quoting *Hamm*, 379 U.S. at 314).

153. See *Rachel*, 384 U.S. at 785, 789–92.

154. Id. at 792. The Court ultimately upheld the removals based on the Civil Rights Act of 1964, which it said "plainly qualifies" as a law specifically providing for racial equality. See id. at 792–93.

155. See, e.g., Johnson v. Mississippi, 421 U.S. 213 (1975); City of Greenwood v. Peacock, 384 U.S. 808, 847 (1966) (Douglas, J., dissenting) (pointing out that under the Court's reasoning, state action designed to punish or deter the exercise of rights under the Voting Rights Act of 1965 does not constitute a denial of equal civil rights enabling removal); Vlaming v. W. Point Sch. Bd., 10 F.4th 300, 308–11 (4th Cir. 2021) (rejecting civil rights removal because Title IX of the Education Amendments of 1972 addresses sex discrimination rather than racial discrimination). For discussion of *Johnson*, see infra notes 168–173 and accompanying text.

156. See *Peacock*, 384 U.S. at 810–14 (majority opinion). These were among the first removals of criminal cases in Mississippi during the 1960s. See infra Appendix A.

157. *Peacock*, 384 U.S. at 810–12.

158. Id. at 812–14 (internal quotation marks omitted) (quoting the defendants' petitions for removal).

discriminatory *application* of state laws such that "the arrest and charge under the statute were effected for reasons of racial discrimination."[159]

The Supreme Court rejected the Fifth Circuit's reasoning in a 5-4 decision, saying it is insufficient "to allege or show that the defendant's federal equal civil rights have been illegally and corruptly denied by state administrative officials in advance of trial, that the charges against the defendant are false, or that the defendant is unable to obtain a fair trial in a particular state court."[160] The civil rights removal statute, the Court said, "does not require and does not permit the judges of the federal courts to put their brethren of the state judiciary on trial."[161] Removal depends instead on a clear showing that by reason of state law, a defendant's federal rights (expressed in a federal statute addressing racial equality) "will inevitably be denied by the very act of bringing the defendant to trial in the state court."[162]

The Court proceeded to expressly reaffirm the *Strauder–Rives* doctrine[163] and suggest various other remedies available to defendants in this position.[164] It also teased out, in light of the "phenomenal increase" in criminal cases removed to federal court between 1963 and 1965, a future in which federal courts would be overwhelmed by cases "on any charge from a five-dollar misdemeanor to first-degree murder," in which questions of choice of law and prosecutorial authority abound, and in

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159. See id. (internal quotation marks omitted) (quoting Peacock v. City of Greenwood, 347 F.2d 679, 684 (5th Cir. 1965)); Weathers v. City of Greenwood, 347 F.2d 986, 986 (5th Cir. 1965) (per curiam) (reversing remand of the second group of cases on the same ground as the first group); *Peacock*, 347 F.2d at 684 (reversing remand of the first group of cases).

160. *Peacock*, 384 U.S. at 827.

161. Id. at 828.

162. Id. Accordingly, since (1) "no federal law confers an absolute right on private citizens—on civil rights advocates, on [Black people], or on anybody else—to obstruct a public street, to contribute to the delinquency of a minor, to drive an automobile without a license, or to bite a policeman" (some of the charges against defendants in this case) and (2) "no federal law confers immunity from state prosecution on such charges," civil rights removal was not available to these defendants. See id. at 826–27, 831.

The Court also construed the second subsection of the removal statute, concluding that it "confers a privilege of removal only upon federal officers or agents and those authorized to act with or for them in affirmatively executing duties under any federal law providing for equal civil rights." See id. at 814–24 (citing 28 U.S.C. § 1443(2) (1964)).

163. See id. at 831. While the Court stressed that it "need not and do[es] not necessarily approve or adopt all the language and all the reasoning of every one of this Court's opinions construing this removal statute," it emphasized that "those decisions were correct in their basic conclusion that the provisions of § 1443(1) do not operate to work a wholesale dislocation of the historic relationship between the state and the federal courts in the administration of the criminal law." Id.

164. See id. at 828–30 (highlighting federal habeas corpus and federal injunctions against state proceedings). Removal is ordinarily preferable for civil rights litigants because it happens early in the case and "brings not only the federal issue but the entire case into the preferred federal forum." See Fallon et al., supra note 24, at 860.

which "hundreds of new federal judges and other federal court personnel would have to be added in order to cope with the vastly increased caseload that would be produced."[165] Congress, the Court emphasized, could surely provide for such a system, and that was the point: "[I]f changes are to be made in the long-settled interpretation of the provisions of this century-old removal statute, it is for Congress and not for this Court to make them."[166]

As with *Strauder* and *Rives* in the nineteenth century, the Supreme Court's narrow interpretation of the civil rights removal statute in *Rachel* and *Peacock* rendered the provision practically useless for the foreseeable future.[167] The Court applied its interpretation a decade later in *Johnson v. Mississippi*,[168] organizing its doctrine into a two-prong test[169] and rejecting

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165. See *Peacock*, 384 U.S. at 832–34.

166. Id. In a powerful dissent joined by Chief Justice Earl Warren and Justices William J. Brennan and Abe Fortas, Justice William O. Douglas called for the Court to overrule the *Strauder–Rives* doctrine. See id. at 835–54 (Douglas, J., dissenting). Tracing the history of removal from the Judiciary Act of 1789, he argued that "the federal regime was designed from the beginning to afford some protection against local passions and prejudices by the important pretrial federal remedy of removal." Id. at 836. He explained:

> First, a federal fact-finding forum is often indispensable to the effective enforcement of [federal civil rights] guarantees against local action. The federal guarantee turns ordinarily upon contested issues of fact. Those rights, therefore, will be of only academic value in many areas of the country unless the facts are objectively found. Secondly, swift enforcement of the federal right is imperative if the guarantees are to survive and not be slowly strangled by long, drawn-out, costly, cumbersome proceedings which the Congress feared might result in some state courts. The delays of state criminal process, the perilous vicissitudes of litigation in the state courts, the onerous burdens on the poor and the indigent who usually espouse unpopular causes—these threaten to engulf the federal guarantees. It is in that light that 28 U.S.C. § 1443(1) should be read and construed.

Id. at 839–40 (footnote omitted). Justice Douglas proposed distinguishing the terms "is denied" and "cannot enforce" in the removal statute, with the former enabling removal amid a "*present* deprivation of rights" and the latter amid an "*anticipated* state court frustration of equal civil rights." Id. at 841. Accordingly, "[w]hatever the correctness of [*Rives* and its progeny] as to the 'cannot enforce' clause, they have no application whatever to a claim of a present denial of equal civil rights." Id. at 842 (quoting 28 U.S.C. § 1443(1)).

167. See supra notes 58–61 and accompanying text; supra section II.B.2; see also Greenberg, supra note 85, at 379 ("[By then] virtually no movement people were being prosecuted under segregation laws. Prosecutions were for breach of the peace, parading without a permit, traffic offenses, trespass, and so forth. These were prosecutions for civil rights activity, but in the guise of general criminal law enforcement and, therefore, not removable.").

168. 421 U.S. 213 (1975).

169. The Court said that a removal petition under 28 U.S.C. § 1443(1) must satisfy two requirements:

> First, it must appear that the right allegedly denied the removal petitioner arises under a federal law "providing for specific civil rights stated in terms of racial equality." Claims that prosecution and conviction will violate rights under constitutional or statutory provisions of general applicability

the availability of removal for a group of defendants who were charged under state law after encouraging the boycott of Vicksburg, Mississippi, merchants that discriminated in hiring practices.[170] It ruled that a provision of the Civil Rights Act of 1968 prohibiting forceful interference with federally protected civil rights activities was not a law providing for equal civil rights within the meaning of the removal statute because "it evinces no intention to interfere in any manner with state criminal prosecutions."[171] In other words, because the Act criminalized violations of federal civil rights enacted in separate legislation but did not itself provide any substantive rights, defendants in state trials could not use it as a basis for civil rights removal.[172] This case—indicative of how the Court's suffocative interpretation had once again rendered civil rights removal

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> or under statutes not protecting against racial discrimination, will not suffice. . . .
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> Second, it must appear . . . that the removal petitioner is "denied or cannot enforce" the specified federal rights "in the courts of [the] State." This provision normally requires that the "denial be manifest in a formal expression of state law," such as a state legislative or constitutional provision, "rather than a denial first made manifest at the trial of the case." Except in the unusual case where "an equivalent basis could be shown for an equally firm prediction that the defendant would be 'denied or cannot enforce' the specified federal rights in the state court," it was to be expected that the protection of federal constitutional or statutory rights could be effected in the pending state proceedings, civil or criminal.

Id. at 219–20 (alteration in original) (citations omitted) (first, fourth, fifth, and sixth quotations quoting Georgia v. Rachel, 384 U.S. 780, 792, 799, 803–04 (1966); second and third quotations quoting 28 U.S.C. § 1443(1)).

170. See id. at 215–16, 222.

171. See id. at 222–27. The provision is now located at 18 U.S.C. § 245 (2018).

172. In dissent, Justice Marshall, joined by Justice Brennan, endorsed the interpretation of the removal statute supplied by Justice Douglas's dissent in *Peacock*. See id. at 229 (Marshall, J., dissenting) (citing City of Greenwood v. Peacock, 384 U.S. 808, 840–48 (1966) (Douglas, J., dissenting)); supra note 166. Justice Douglas, still on the Court, did not participate in this case due to a debilitating stroke in December 1974. See Warren Weaver Jr., Douglas's Stroke Affects Left Arm; Doctors Report No Evidence of Mental Impairment, N.Y. Times, Jan. 3, 1975, at 25. Justice Marshall also explained in detail why the contested provision of the Civil Rights Act of 1968 nevertheless meets the requirements of *Rachel* and *Peacock*. See *Johnson*, 421 U.S. at 229–39 (Marshall, J., dissenting). Five Fifth Circuit judges made a similar argument below. See Johnson v. Mississippi, 491 F.2d 94, 94–95 (5th Cir. 1974) (Brown, C.J., dissenting from denial of petition for rehearing en banc).

In response to the Court's reemphasis of other remedies available to defendants in this position, *Johnson*, 421 U.S. at 228, Justice Marshall concluded:

> The possibility that the petitioners might be vindicated in state-court criminal actions or through subsequent habeas corpus relief will do little to restore what has been lost: the right to engage in legitimate, if unpopular, protest without being subjected to the inconvenience, the expense, and the ignominy of arrest and prosecution. If the federal courts abandon persons like the petitioners in this case without a fair hearing on the merits of their claims, then in my view comity will have been bought at too great a cost.

Id. at 239 (Marshall, J., dissenting).

(and the immediate recognition of federal rights it enables) practically unavailable—is the Supreme Court's most recent examination of the statute.[173]

III. THE TWENTY-FIRST CENTURY: CIVIL RIGHTS REMOVAL'S LASTING POTENTIAL

As made clear by its text and history, civil rights removal is a jumbled mess. The statute itself is unclear,[174] the judicial decisions attempting to make sense of it have rendered it practically useless,[175] and its one period of utility was accordingly fraught with confusion.[176] Even if fully realized as a forum choice tool for circumstances with a heightened risk of discriminatory judicial treatment, it would likely benefit only a small group of defendants. But the Mississippi case study reveals why that small group is worth such special attention.[177] Indeed, it reveals civil rights removal's enduring potential as an institutional check against the prejudices—some subtle, some explicit—that arise in each generation and obscure the proper administration of justice. Such checks are hallmarks of our system of government, and it is well past time to reform civil rights removal to secure its utility for generations to come.

This Part makes the case for revitalizing civil rights removal in the twenty-first century. Section III.A discusses the role of civil rights removal in our federal system. Section III.B explores the form that a modernized statute might take, suggests how it might be adopted, and notes arguments that expanding civil rights removal is disruptive of the state–federal balance.

A. *Removal's Role*

Civil rights removal fills a gap in our federal system. Ordinarily, defendants with federal claims may seek federal review of state court decisions only after exhausting available state appeals and only through discretionary review by writ of certiorari from the Supreme Court.[178]

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173. Federal courts of appeals, despite disagreeing with the Court's interpretation, apply the *Rives–Peacock* doctrine to this day. See, e.g., Vlaming v. W. Point Sch. Bd., 10 F.4th 300, 310 (4th Cir. 2021).

174. See supra note 3 (text of the statute); supra notes 32–33 and accompanying text.

175. See supra section I.B (nineteenth-century interpretations); supra section II.C (twentieth-century interpretations).

176. See supra section II.B.

177. Lacking the data but sharing the sentiment, the dissenting Justices in the Supreme Court's cases amid the aftermath of that moment in Mississippi argued as much in their opinions. See supra note 166 (discussing Justice Douglas's dissent in *Peacock*); supra note 172 (discussing Justice Marshall's dissent in *Johnson*).

178. Jonathan R. Siegel, Habeas, History, and Hermeneutics, 64 Ariz. L. Rev. 505, 513 (2022). Before 1988, the Supreme Court had mandatory jurisdiction by appeal to review decisions of state high courts that upheld a state statute against federal constitutional or

Indeed, federal law prohibits lower federal courts from reviewing state court decisions absent explicit congressional authorization.[179] Defendants convicted in state criminal cases may seek a writ of habeas corpus from a federal district court, but that doctrine involves its own series of constraints and also typically requires exhausting state remedies.[180] The reality is that state defendants have no right to federal review if their case remains in the state system; such review is entirely discretionary and most often confined to the Supreme Court.[181] And since defendants usually have no choice over the forum in which litigation is initiated against them, they generally have no opportunity to raise a claim of denial of federal rights in a forum different from the one in which the denial allegedly occurred until they exhaust all state remedies.

Removal is Congress's answer to that quandary. As discussed in Part I, Congress provided for removal jurisdiction as early as 1789 to enable a defendant to defeat the plaintiff's forum choice in specified circumstances.[182] As a result, "the plaintiff chooses the initial court in which to file the claim subject, whenever federal jurisdiction is available, to the defendant's right to rely on the removal statutes' authority."[183] Removal brings the entire case into the appropriate federal forum before trial, placing the defendant in front of a federal judge without potentially years of litigation—and in criminal cases, confinement—before getting the chance to seek discretionary review of a final state judgment.[184] The removal right does not circumvent the state court's "superior" claim to adjudicate the case because the plaintiff's power to choose the forum is not superior to the defendant's power to remove.[185] Congress has structured the system to expressly permit defendants to employ removal as a "significant counterbalance" to the principle that the plaintiff is the master of their claim.[186]

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statutory challenge. See 28 U.S.C. § 1257(2) (1982). Congress eliminated such appeals by right in the Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, 102 Stat. 662, leaving the Court with only discretionary review by writ of certiorari, see 28 U.S.C. § 1257(a) (2018).

179. See D.C. Ct. of Appeals v. Feldman, 460 U.S. 462, 486 (1983); Rooker v. Fid. Tr. Co., 263 U.S. 413, 415–16 (1923); see also Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 283 (2005) (clarifying that the *Rooker–Feldman* doctrine stems from 28 U.S.C. § 1257).

180. See 28 U.S.C. § 2254(b)(1)(A); Fallon et al., supra note 24, at 860; Siegel, supra note 178, at 513–16 (discussing the current model of habeas corpus as a "constrained certiorari substitute").

181. See Amsterdam, Federal Removal, supra note 13, at 857 n.241.

182. See Bassett & Perschbacher, supra note 13, at 3–6; supra notes 13–17 and accompanying text.

183. Bassett & Perschbacher, supra note 13, at 3–6.

184. See Fallon et al., supra note 24, at 860.

185. See Bassett & Perschbacher, supra note 13, at 3–6.

186. See id.

Civil rights removal, like its federal officer counterpart,[187] is an expression of a specific circumstance in which Congress has chosen to impose that balance in the state–federal system. Its enactment separate from the general removal provision is necessary because there are instances in which defendants seeking to invoke civil rights removal would not otherwise be eligible to remove at all (leaving them in the quandary described above).[188] The statute that enables it is poorly drafted,[189] but its purpose is clear: to enable anticipatory federal jurisdiction—and with it special national attentiveness—over federal civil rights claims. Far from an unbridled intrusion into state affairs, civil rights removal jurisdiction provides defendants with a tool that neutralizes the generally stark imbalance in forum choice doctrine. Indeed, especially in criminal cases, for which the initial forum is almost always the state and federal intervention is most limited, civil rights removal cures a fundamental imbalance in our federal system.

Congress's decision to privilege civil rights litigants with this forum choice (over many other litigants with federal defenses for whom removal is unavailable) arises from its recognition that subtle prejudices are more likely to influence the administration of justice in cases involving minority groups.[190] These prejudices can be difficult to detect, especially after the fact, which partly explains why the *Rives–Peacock* interpretation of the removal statute is so confounding. Facial state denials of federal rights are

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187. The relevant text of the current federal officer removal statute reads:

> (a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C. § 1442 (2018); see also supra notes 23–26 and accompanying text.

188. The general removal statute enables removal in almost all instances in which the state and federal court have concurrent jurisdiction. See 28 U.S.C. § 1441(a). The most notable exception is that removal is not available when the federal court has only diversity jurisdiction and a defendant is a citizen of the state in which the plaintiff initiated the action. See id. § 1441(b)(2). The civil rights removal statute, in contrast, enables removal of cases that lack concurrent jurisdiction (e.g., cases involving only state claims or cases with no diversity jurisdiction). See id. § 1443.

189. See supra note 3 (text of the statute); supra notes 32–33 and accompanying text.

190. See Amsterdam, Federal Removal, supra note 13, at 803 ("[In] cases involving civil rights, 'Congress has declared the historic judgment that . . . there is to be no slightest risk of nullification by state process.' . . . [It] commanded federal trial courts to anticipate and supersede state court trials for the complete and timely enforcement of interests 'of the highest national concern.'" (quoting Herbert Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Probs. 216, 230 (1948))).

rare and more easily corrected by the Supreme Court on discretionary review;[191] it is when "the denial rests instead on hidden, stubborn administrative discrimination, when assessment and correction depend on unbiased, careful fact-finding, and when an inadequate record effectively immunizes the denial from appellate correction" that civil rights removal jurisdiction is most needed.[192] Prejudices also fluctuate over time, between judges, and across forums.[193] Indeed, it may often be the case that—compared to the state forum in which litigation begins—the federal forum available to a defendant is just as or even more unlikely to afford the full protections of federal law.[194] Forum choice thus becomes a critical determination unique to the circumstances of each case, and civil rights removal operationalizes Congress's belief that a defendant subject to potential prejudice should have greater say over the forum in which their case proceeds.

B. *Reform*

As currently drafted and interpreted, the civil rights removal statute does not serve the purposes behind Congress's original provision of civil rights removal jurisdiction. A modernized statute must restore civil rights removal's forum-choice-allocating role in the federal system while avoiding the pitfalls underlying the Supreme Court's 1966 interpretation

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191. But eliminating mandatory review of state judgments upholding state laws against federal challenge heightens removal's value to defendants. See supra note 178 and accompanying text.

192. Schmidt, supra note 17, at 1436; see also Amsterdam, Federal Removal, supra note 13, at 857–58 ("This is the case where local prejudice, local resistance, pitch the risk of error, always incident in fact finding, strongly against federal contentions . . . ." (footnote omitted)); Martin H. Redish, Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles", 78 Va. L. Rev. 1769, 1778 (1992) (viewing favorably the litigant-choice justification for removal jurisdiction in situations "[w]here a particular substantive federal right is given to a group deemed by Congress to be in special need of protection"). Justice Douglas also endorsed this justification for civil rights removal jurisdiction in his *Peacock* dissent. See supra note 166.

193. See City of Greenwood v. Peacock, 384 U.S. 808, 839 (1966) (Douglas, J., dissenting) ("[Those] subject [to] repression are not only those who espouse the cause of racial equality. Jehovah's Witnesses . . . have likewise felt the brunt of majoritarian control . . . . Before them were the labor union organizers. Before them were [East Asian immigrants]. It is in this setting that the removal jurisdiction must be considered."). It appears that Justice Douglas borrowed this language almost verbatim from Professor Amsterdam's 1965 treatment of civil rights removal. See Amsterdam, Federal Removal, supra note 13, at 840 (adding the "Unionists" and "Cherokees" to this list of defendants dependent on the Constitution but generally unable to secure its guarantees without federal anticipatory jurisdiction).

194. See, e.g., supra section II.B (highlighting Judge Cox's resistance to civil rights removal and his clashes with petitioners); see also Amsterdam, Federal Removal, supra note 13, at 837 n.186 ("[Some federal judges] are more hostile to certain federal rights than the mine run of state judges; and, of course, there are individual state judges who are more sensitive to federal rights than the mine run of the federal district bench.").

of the statute.[195] An eligible defendant should have the choice to shift litigation against them to a federal forum without showing a facial state denial of race-based federal rights, but their removal should not trigger a lengthy trial-within-a-trial that requires the federal court to produce findings about the latent prejudices of its state brethren.[196] In short, modern civil rights removal should empower defendants with forum choice in a set of clearly prescribed circumstances implicating civil rights.

1. *Form.* — Modern civil rights removal could take multiple forms. Given the extent to which the Supreme Court's current interpretation of the statute diverges from the text,[197] 28 U.S.C. § 1443 is arguably ripe for reinterpretation. Some of the Court's recent decisions, such as *Bostock v. Clayton County*,[198] suggest that contemporary textual methods of statutory interpretation may lead the Court to abandon several of the requirements that it has previously read into the statute. Nowhere does the statute's text, for instance, require a defendant to show that the denial of their federal rights arose from a facially discriminatory state law,[199] nor does it limit the federal rights justifying removal to substantive statutory rights stated in terms of racial equality.[200] The statute simply states that removal is available in actions "[a]gainst any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof."[201]

However egregious its prior interpretations, though, the Court is unlikely to overturn half-century-old precedent and extend the scope of federal jurisdiction when Congress can readily clarify the removal statute itself by amending it. The Court has said that "*stare decisis* in respect to statutory interpretation has 'special force,' for 'Congress remains free to alter what [the Court has] done.'"[202] And while a statute affecting federal jurisdiction "must be construed both with precision and with fidelity to the

195. See supra notes 160–166 and accompanying text.

196. See supra notes 134–142 and accompanying text.

197. See supra note 3 (text of the statute); supra section II.C (discussing the Court's most recent interpretations).

198. 140 S. Ct. 1731 (2020). There, Justice Neil Gorsuch said this of the "unexpected consequences" of the Civil Rights Act of 1964: "Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. . . . But the limits of the drafters' imagination supply no reason to ignore the law's demands. . . . Only the written word is the law, and all persons are entitled to its benefit." Id. at 1737.

199. As first announced by the Court in *Virginia v. Rives*, see supra section I.B, and most recently affirmed in *City of Greenwood v. Peacock*, see supra section II.C.

200. As announced by the Court in *Georgia v. Rachel*. See supra section II.C.

201. 28 U.S.C. § 1443(1) (2018).

202. John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008) (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989)).

terms by which Congress has expressed its wishes,"[203] Congress's longstanding silence in the wake of the Court's 1966 decisions—as well as its 1964 decision to reenable appeals rather than actually amend the already-limited statute—will likely caution the Court away from upending its removal precedents.[204]

Therefore, it is likely up to Congress to restate the scope and requirements of civil rights removal in statutory reform. The provision's broad language can certainly be clarified, and experience suggests that the provision would benefit from more detailed explication in the statute itself.[205] Reform by legislative amendment would also clear away the centuries of restrictive precedent that presently limits removal and enable Congress to plainly express the scope of this form of jurisdiction, a suggestion for which is proposed here.

2. *Scope.* — The modernized civil rights removal statute should be broad enough to cover all cases in which defendants raise a colorable defense arising out of their expression of a civil right that is specifically enumerated in the removal statute. In other words, a state civil suit or criminal prosecution brought against a defendant *because* the defendant asserted a covered federal statutory right should constitute a plausible "denial" of that right within the meaning of the removal statute. The federal rights enabling removal should include by reference those rights found in federal laws of egalitarian purpose,[206] though it may be preferable—as a matter of controlling the flow of cases from state to federal court—for Congress to articulate the rights enabling removal in the removal statute itself. Under that scenario, a defendant could not justify removal based on a right arising generally from the U.S. Constitution, for example, but instead would have to look to Congress for statutory conferral of removal jurisdiction over cases implicating that right.

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203. Kucana v. Holder, 558 U.S. 233, 252 (2010) (internal quotation marks omitted) (quoting Cheng Fan Kwok v. Immigr. & Naturalization Serv., 392 U.S. 206, 212 (1968)); see also New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 359 (1989) (noting the "undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds").

204. See supra section II.A (discussing the 1964 legislation); supra section II.C (discussing the 1966 decisions). The Court said as much in its *Peacock* decision. See supra text accompanying note 166.

205. See supra section II.B. Congress can take as an example the neighboring federal officer removal statute, which is five times longer and defines relevant terms. See 28 U.S.C. § 1442.

206. E.g., Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327; Age Discrimination Act of 1975, Pub. L. No. 94-135, 89 Stat. 728; Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235; Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; see also Equality Act, S. 393, 117th Cong. (2021); Equality Act, H.R. 5, 117th Cong. (2021).

In addition, modern civil rights removal should not be limited to cases involving race-based rights, as is currently the case under the Supreme Court's 1966 interpretation.[207] The text of the current statute includes no such restriction; it refers broadly to "any law" providing for equal civil rights.[208] The four Justices dissenting from the Court's opinion in *Peacock* emphasized that "the minorities who are the subject of repression are not only those who espouse the cause of racial equality"; their opinion also lists the plight of religious minorities, ethnic minorities, and even labor union organizers as the "setting [in which] removal jurisdiction must be considered."[209] The availability of civil rights removal for Black defendants remains essential, especially as facially discriminatory state laws have given way to subtler and perhaps more pervasive means of denying federal civil rights guarantees.[210] But other prejudices abound, and today many defendants seeking to vindicate federal rights based on sex,[211] sexual

207. See supra notes 153–155 and accompanying text (discussing the *Rachel* Court's narrow reading of the statute).

208. See 28 U.S.C. § 1443; supra note 3 (text of the statute).

209. See City of Greenwood v. Peacock, 384 U.S. 808, 839 (1966) (Douglas, J., dissenting); supra note 193.

210. See Kenji Yoshino, Covering: The Hidden Assault on Our Civil Rights 21–22 (2006) ("We are at a transitional moment in how Americans discriminate. In the old generation, discrimination targeted entire groups . . . . In the new generation, discrimination directs itself not against the entire group, but against the subset of the group that fails to assimilate to mainstream norms."); Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1379 (1988) ("The end of Jim Crow has been accompanied by the demise of an explicit ideology of white supremacy. The white norm, however, . . . has only been submerged in popular consciousness. It continues in an unspoken form . . . , legitimating the continuing domination of those who do not meet it."); Elizabeth F. Emens, Intimate Discrimination: The State's Role in the Accidents of Sex and Love, 122 Harv. L. Rev. 1307, 1309 (2009) ("Most . . . decisionmakers . . . no longer say overtly discriminatory things. Discrimination is therefore harder to find and to regulate, because it has become less acceptable, legally and socially, to speak its language. Yet some . . . in our society, such as people of color and disabled people, are still subject to systematic disadvantage.").

211. For example, the Supreme Court's decision in Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022), is likely to spur a complicated web of state laws regulating abortion. See David S. Cohen, Greer Donley & Rachel Rebouché, The New Abortion Battleground, 123 Colum. L. Rev. 1, 22, 30–34 (2023) (discussing jurisdictional issues that arise from conflicting extraterritorial antiabortion laws). It is also likely that those bills will in certain circumstances conflict with current and future federal statutory sex-based rights, enabling removal under a modernized civil rights removal statute when access to a federal forum would not otherwise be possible. See id. at 52–53 ("Interstate issues are not the only area that will cause deep confusion: Interaction between federal and state law will also be complicated and in flux.").

orientation,[212] and gender identity,[213] for example, may anticipate different treatment depending on the forum in which litigation against

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212. Certain state courts are statistically less supportive of LGBTQ rights. See Eric Lesh, Lambda Legal, Justice Out of Balance: How the Election of Judges and the Stunning Lack of Diversity on State Courts Threaten LGBT Rights 22 (2016), https://legacy.lambdalegal.org/sites/default/files/publications/downloads/justiceoutofbalance_final_rev1_2.pdf [https://perma.cc/PC4F-EZXQ] (finding through data from state judiciaries that "[s]tate high courts whose judges stand for election are less supportive of LGBT rights claims" than those whose judges receive lifetime tenure). Thus, LGBTQ defendants in state courts with elected judges would benefit from the choice whether to proceed in federal court, thereby more likely avoiding "implicit bias, ideological factors and outside influences [that] seep into the courtroom[] [and] taint[] the judicial decision-making process." Id. at 3.

Civil rights removal would also provide seemingly the only opportunity for defendants targeted by the recent rise of anti-LGBTQ state legislation to shift cases against them to a federal forum. See, e.g., Priya Krishnakumar & Devan Cole, 2022 Is Already a Record Year for State Bills Seeking to Curtail LGBTQ Rights, ACLU Data Shows, CNN (July 17, 2022), https://www.cnn.com/2022/07/17/politics/state-legislation-lgbtq-rights/ [https://perma.cc/3HK9-9T6Z]. For instance, more than a dozen states have proposed or enacted "Don't Say Gay" legislation targeting the discussion of sexual orientation and gender identity in schools. See Dustin Jones & Jonathan Franklin, Not Just Florida. More Than a Dozen States Propose So-Called 'Don't Say Gay' Bills, NPR (Apr. 10, 2022), https://www.npr.org/2022/04/10/1091543359/15-states-dont-say-gay-anti-transgender-bills [https://perma.cc/72N7-5F32]. Florida's version, enacted in July 2022, creates a private right of action empowering any parent to seek declaratory and injunctive relief and receive damages awards from school districts that violate the law. See 2022 Fla. Laws 22 (codified as amended at Fla. Stat. Ann. § 1001.42(8)(c)(7)(b)(II) (West 2023)). Due in part to its vagueness and resulting broad potential for legal action, the law has already had a notable chilling effect on Florida educators. See Sarah Mervosh, Back to School in DeSantis's Florida, as Teachers Look Over Their Shoulders, N.Y. Times (Aug. 27, 2022), https://www.nytimes.com/2022/08/27/us/desantis-schools-dont-say-gay.html (on file with the *Columbia Law Review*); Jo Yurcaba, Florida Teachers Navigate Their First Year Under the 'Don't Say Gay' Law, NBC News (Aug. 19, 2022), https://www.nbcnews.com/nbc-out/florida-teachers-navigate-first-year-dont-say-gay-law-rcna43817 [https://perma.cc/H6W7-HY72]. Assuming that any action brought against these educators involves only state claims, they would have no choice but to proceed in Florida state courts. For an argument that these types of laws violate the U.S. Constitution, see Clifford Rosky, Anti-Gay Curriculum Laws, 117 Colum. L. Rev. 1461, 1517–34 (2017).

This does not mean that federal courts are generally preferable for LGBTQ parties. See, e.g., William B. Rubenstein, The Myth of Superiority, 16 Const. Comment. 599, 599 (1999) (showing that "gay litigants seeking to establish and vindicate civil rights have generally fared better in state courts than they have in federal courts"); Strict Scrutiny, Queer Supremacy (A Pride Special), Crooked Media, at 45:09–48:58 (June 16, 2022), https://crooked.com/podcast/queer-supremacy/ (on file with the *Columbia Law Review*) (ACLU attorney Chase Strangio discussing the decision to challenge Texas's antitrans actions in state court due to expected unfavorable treatment in the Fifth Circuit). Many factors affect the extent of bias among members of the judiciary, and modern civil rights removal would enable the litigants most likely to be affected by that bias to choose the forum in which to proceed.

213. The implications of state-court prejudice based on sexual orientation and the rise of "Don't Say Gay" laws, see supra note 212, apply with even more force to gender identity. Other recent state legislation specifically target transgender youth. See, e.g., Devan Cole, Arizona Governor Signs Bill Outlawing Gender-Affirming Care for Transgender Youth and Approves Anti-Trans Sports Ban, CNN (Mar. 30, 2022), https://www.cnn.com/2022/

them proceeds.[214] When the potential for such disparate treatment exists—notwithstanding whether there is actual evidence of discrimination—Congress has sought to shift the balance in forum choice. And when the general removal statute fails to capture the full range of eligible cases, civil rights removal fills the gap.

This approach eliminates the federal court's consideration of state prejudice on motions to remand, limiting the post-removal finding required of the federal judge to the question whether the defendant has plausibly shown that their actions giving rise to the case were protected by a federal civil right. It also vindicates removal's basic purpose as an initial forum-setting tool rather than a trial-within-a-trial delay mechanism. Congress has determined that prejudice against defendants raising federal civil rights defenses is possible, and it extended removal as a check against that risk; the federal court's role upon receiving such cases generally is to proceed with them, not to conduct lengthy investigations of the circumstances leading to their removal. In addition, enabling removal based on only specific federal statutory rights (and not constitutional rights standing alone) enables lower courts to construe the statute with fidelity to Congress's intended scope of removal jurisdiction; Congress can pass laws affirming specific constitutional rights in statutory form as needed, avoiding a blanket extension of federal jurisdiction over any case in which a defendant can plausibly raise a constitutional defense.

03/30/politics/arizona-transgender-health-care-ban-sports-ban/index.html [https://perma.cc/C49D-TS5W]; Dean Mirshahi, Gov. Youngkin Unveils Administration's Plan to Replace Virginia's Transgender Student Policies, ABC 8News (Sept. 16, 2022), https://www.wric.com/news/virginia-news/gov-youngkin-unveils-administrations-plan-to-replace-virginias-model-transgender-policies/ [https://perma.cc/KNN7-2BGG] (detailing proposed guidelines requiring transgender students to use school bathrooms that align with the sex they were assigned at birth). Some state laws targeting transgender students may violate Title IX. See, e.g., Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 593, 619 (4th Cir. 2020) (holding that a policy requiring students to use bathrooms based on their biological sex unlawfully discriminated against transgender students in violation of Title IX).

In a 2021 case involving the firing of a schoolteacher due to their treatment of a transgender student, the Fourth Circuit reviewed a school board's removal of a suit to federal court under 28 U.S.C. § 1443 based on the board's Title IX defense. See Vlaming v. W. Point Sch. Bd., 10 F.4th 300, 303 (4th Cir. 2021). The court rejected the removal due to the Supreme Court's restrictive interpretations of the statute, saying it did not endorse the Court's view of the statute but was "bound to apply it." Id. at 311.

214. The statute would not be limited to those examples. The forum-setting purpose of civil rights removal is adequately supported only by a statute that enables removal in the countless overlooked situations in which people unpopular in their community seek to vindicate their federal rights.

Several scholars have posited their own visions of civil rights removal, some too narrow[215] and some too broad[216] to successfully avoid the pitfalls that have plagued the removal statute throughout its history. This Note's framework is similar to that imposed on defendants seeking removal under the federal officer removal statute, an analogous congressional extension of removal jurisdiction over cases potentially implicating national concerns.[217] The Supreme Court has repeatedly emphasized how that provision is to be "liberally construed to give full effect to the purposes for which [it was] enacted."[218] It has also rejected the notion that removal of federal officer cases should be sustained "only when the officers had a *clearly sustainable* defense," stressing that removal's very purpose "is to have the validity of the defense . . . tried in a federal court."[219] For both federal officer and civil rights removal, then, nothing more than plausibility should be required to survive a motion to remand.

3. *Consequences.* — A significant consequence of the expansion of civil rights removal would be the disruption of the federal–state jurisdictional balance, especially in criminal actions. After all, a statute even moderately broader than the currently restricted version would enable removal for far

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215. Professor Martin Redish suggests that the removal provision should be interpreted to authorize removal when "established state judicial practices and procedures violate a federal civil right of equality" or when "state procedures are so defective or the applicable state precedents so in conflict with federal law that the defendant will be unable adequately to vindicate his applicable federal substantive rights in the state judicial system." Martin H. Redish, Revitalizing Civil Rights Removal Jurisdiction, 64 Minn. L. Rev. 523, 525 (1980) [hereinafter Redish, Revitalizing Civil Rights Removal] (footnote omitted). This approach would require a rigorous postremoval inquiry by the federal court, one perhaps even more expansive than the proceedings in removal cases during the Civil Rights Movement. See Amsterdam, Federal Removal, supra note 13, at 858 (explaining why "this sort of inquiry is inconvenient and judicially embarrassing in the extreme"); supra section II.B.

216. Professor Amsterdam argues that removal should be made available on "a colorable showing that the conduct for which [the defendant] is prosecuted was conduct protected by the federal constitutional guarantees of civil rights." See Amsterdam, Federal Removal, supra note 13, at 804, 861–74. But enabling removal based on general federal constitutional defenses risks extending the scope of civil rights removal jurisdiction far beyond what Congress would likely intend. The *Peacock* Court's fear of an overwhelmed federal judiciary tasked with handling countless cases that plausibly allege the denial of some federal constitutional right, see supra note 165 and accompanying text, becomes more realistic. Remand decisions would be inconsistent between judges and across forums, and statutory expressions of federal rights would do little to clarify a jurisdictional scope that includes all rights originating from the Constitution.

217. See 28 U.S.C. § 1442 (2018); Mesa v. California, 489 U.S. 121, 133–34 (1989) (concluding that § 1442(a)(1) encompasses cases in which federal officers raise a colorable defense arising out of their duty to enforce federal law); Willingham v. Morgan, 395 U.S. 402, 406–07 (1969) (stating that the right of removal under § 1442(a)(1) is absolute when a suit in state court is for any act "under color" of federal office); supra note 187 (text of the federal officer removal statute).

218. Colorado v. Symes, 286 U.S. 510, 517 (1932); see also, e.g., Watson v. Philip Morris Cos., 551 U.S. 142, 147 (2007); *Willingham*, 395 U.S. at 406.

219. *Willingham*, 395 U.S. at 407 (emphasis added).

more people than does the federal officer removal statute. Determining the extent of that disruption requires further research and may be difficult to do in advance given declining explicit prejudice among members of the state and federal judiciaries and the variety of factors that would influence a contemporary civil rights defendant's choice whether to remove from or remain in a state forum.[220] But the very possibility of defendants shifting state criminal cases to federal court would represent a significant change in states' traditionally unfettered authority over the administration of their criminal law.[221] And removal is a particularly salient form of intrusion in that it has typically halted the state's proceeding and begun a new one expected to proceed thereafter in the federal courts.[222]

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220. See supra notes 190–194, 210–214, and accompanying text. At the very least, it is probably safe to predict that the volume of cases removed under a modernized statute would pale in comparison to the waves of removals amid the South's express, unified defiance of federal civil rights law in the 1960s. See Amsterdam, Federal Removal, supra note 13, at 838 ("[M]ost civil rights lawyers would take as many prosecutions as possible out of the southern state courts . . . . [I]f their actions restore confidence in the adequacy of state process, a balance will probably be struck at what is in fact, as well as theory, concurrent state and federal trial jurisdiction."); supra section II.B. For an argument that the inability to calculate state–federal parity should lead to a deemphasis on considerations of the role of parity in defining the role of federal courts, see Erwin Chemerinsky, Parity Reconsidered: Defining a Role for the Federal Judiciary, 36 UCLA L. Rev. 233, 255–80 (1988).

221. Justifications for state sovereignty over criminal matters include, among others, assigning primary responsibility for controlling society through law by preventing interference with law enforcement processes, see David A. Dittfurth, The *Younger* Abstention Doctrine: Primary State Jurisdiction Over Law Enforcement, 10 St. Mary's L.J. 445, 481 (1979); the avoidance of federal constitutional issues that can be decided on state-law grounds, see Amsterdam, Federal Removal, supra note 13, at 830; and that "leaving federal defensive issues to the state criminal courts in the first instance gives those courts a promising opportunity for partnership in the administration of federal law," see id.

The equitable abstention doctrine born from Younger v. Harris, 401 U.S. 37 (1971), for example, prevents federal trial courts from interfering with ongoing state criminal proceedings except in extraordinary circumstances, even on a defendant's "showing the likelihood that the state law underlying that proceeding is in violation of the United States Constitution," see Dittfurth, supra, at 445. Of course, Congress, the definer of federal jurisdiction, see supra note 12, could narrow that doctrine by declaring circumstances justifying civil rights removal as sufficiently extraordinary to warrant federal intervention. Justice Marshall made a similar plea in his dissenting opinion in *Johnson v. Mississippi*, arguing that the Court's decision in *Younger* should not lead the federal courts to adhere strictly to the state–federal balance at all times. See Johnson v. Mississippi, 421 U.S. 213, 239 (1975) (Marshall, J., dissenting) ("I only hope that the recent instances in which this Court has emphasized the values of comity and federalism . . . will not mislead the district courts into forgetting that at times these values must give way to the need to protect federal rights from being irremediably trampled."); supra notes 168–173 and accompanying text.

222. See Redish, Revitalizing Civil Rights Removal, supra note 215, at 548. For an acknowledgment of this issue and a solution that encourages Congress to express the scope of civil rights removal with absolute clarity, see Amsterdam, Federal Removal, supra note 13, at 831–32, 838.

Congress adjusted this aspect of removal procedure in 2011; now "[t]he filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall

The Reconstruction Congress arguably understood the consequences of such a shift when it enacted the originally unrestrained civil rights removal provision,[223] designed then to open the federal courts to defendants who would otherwise almost surely face the explicit denial of their rights in state court systems. Though that form of systematic prejudice is mostly extinguished today and enduring subtler prejudices are more dispersed throughout the country and between the state and federal judiciary,[224] it is not inconceivable that today's Congress could similarly conclude that in certain circumstances the protection of individual rights—especially in contemporary situations when the disregard of those rights may take place but is likely to go undetected—is worth sacrificing absolute parity in the state–federal balance.

This Note argues that Congress should conclude as much,[225] but it recognizes that such a judgment would come with costs—primarily involving resource constraints—that are more fully explored in other scholarship.[226] At the very least, it is important to acknowledge that the resource constraints imposed on the federal judiciary are themselves policy choices; it may make sense, then, for Congress to accompany an expansion of removal jurisdiction with expansion of the federal bench[227] or with the elimination or reduction of diversity jurisdiction.[228] But even

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not be entered unless the prosecution is first remanded." Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, sec. 103(c), 125 Stat. 758, 761 (codified at 28 U.S.C. § 1455(b)(3)). A revised civil rights removal statute would likely also require revising this provision since continuation of the state court proceeding would largely defeat the purposes served by Congress's grant of civil rights removal jurisdiction.

223. See Kutler, supra note 15, at 143–60 ("In a variety of ways, . . . the federal system was given authority to assume a more dominant position over the state courts. . . . While Congress seldom verbalized its broader aims, the cumulative effect of its [removal] legislation was a tremendous alteration of federal power."); see also Amsterdam, Federal Removal, supra note 13, at 829–30 ("Ample extension of such protective jurisdiction was the critical concern of the Reconstruction Congresses. In matters of civil rights, it was their considered resolution of the federal problem."); Redish, Revitalizing Civil Rights Removal, supra note 215, at 548 ("By explicitly calling for pretrial removal, the civil rights removal statute represents a congressional determination that those denied specified civil rights in state court need not suffer the physical, financial, and emotional expense of a state trial.").

224. See supra notes 190–194, 210–214, and accompanying text.

225. See supra section III.A.

226. See, e.g., Amsterdam, Federal Removal, supra note 13, at 830–42; Paul M. Bator, The State Courts and Federal Constitutional Litigation, 22 Wm. & Mary L. Rev. 605, 611–12 (1981); Redish, Revitalizing Civil Rights Removal, supra note 215, at 548–53.

227. See Fallon et al., supra note 24, at 42–43 (noting that "the federal district courts are seriously overtaxed by their current caseloads" and that "[o]ne obvious response . . . would be to increase substantially the number of federal judges").

228. See id. ("The leading studies have all recommended substantial curtailments in the diversity jurisdiction . . . ."); Friendly, supra note 35, at 3–4, 139–52 ("Justice Frankfurter said that '[a]n Act for the elimination of diversity jurisdiction could fairly be called an Act for the relief of the federal courts.' . . . [T]he time for such relief has come." (alteration in original) (quoting Nat'l Mut. Ins. v. Tidewater Transfer Co., 337 U.S. 582, 651 (1949) (Frankfurter, J., dissenting))); Larry Kramer, Diversity Jurisdiction, 1990 BYU L. Rev. 97,

were Congress not willing to accept the broad scope of modern civil rights removal suggested here,[229] it should still investigate which defendants are most likely to be impacted by implicit biases and subtle prejudices during judicial proceedings and ensure that they are adequately supported by procedural tools such as the forum-setting choice enabled by removal. Removal has long been widely available to corporations and other well-resourced parties under existing removal statutes,[230] and it is long past time to ensure that the nation's most vulnerable parties are adequately equipped with this tool as well.

CONCLUSION

Civil rights removal represents Congress's recognition that, in certain instances, state courts (and the Supreme Court on discretionary review) are not sufficiently equipped to guarantee federal rights. The removal statute has a long, complicated history, and unlocking its defendant-empowering potential for a third time in our federal experiment would surely involve new challenges not present in the nineteenth or twentieth centuries. But our nation remains beset with dangerous prejudices, including many not surfaced in those times, and those ostracized within today's legal regime deserve every chance at securing a just outcome based on rights guaranteed to all.[231] Removal, by its provision of forum choice, can help provide that chance, as it once briefly did for thousands of defendants caught up in the American justice system.

102–07; Thomas D. Rowe, Jr., Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms, 92 Harv. L. Rev. 963, 969–81 (1979). But see Scott DeVito, Of Bias and Exclusion: An Empirical Study of Diversity Jurisdiction, Its Amount-in-Controversy Requirement, and Black Alienation From U.S. Civil Courts, 13 Geo. J.L. & Mod. Critical Race Persps. 1, 7 (2021) (arguing that raising the amount-in-controversy requirement "reinforces, entrenches, and expands Black alienation from the U.S. justice system by making it harder for those Black claimants willing to trust the system to file in the federal courts").

229. See supra section III.B.2.

230. See Edward A. Purcell, Jr., Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870–1958, at 20–22 (1992) (collecting statistical data about corporate removal during the late nineteenth and early twentieth centuries); Neal Miller, An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction, 41 Am. U. L. Rev. 369, 391 (1992) (noting in a study that "corporations constituted 62% of the defendants" in removal cases during fiscal year 1987).

231. Professor Amsterdam, champion of civil rights removal when it was needed most, said this about the enduring need for a check against state power:

> In time, from locality to locality, these organs may unlearn old prejudices, but predictably they will learn new ones. In time they may unlearn some of the fear and ignorance and interest which underlie all prejudices; but federal guarantees predictably will also develop with time, and insofar as they are needed those guarantees will always represent the gap between the evolving ideal of freedom and the capacity of the representatives of power to let men be free.

Amsterdam, Federal Removal, supra note 13, at 801–02 (footnote omitted).

APPENDIX A:
CRIMINAL CASES REMOVED FROM MISSISSIPPI STATE COURTS, 1961–1969

Removed	*Case Name*	*Docket No.*	*District*	*Division*
8/11/1961	Mississippi v. Brown	3196	S.D. Miss.	Jackson
8/11/1961	Mississippi v. Carey	3197	S.D. Miss.	Jackson
8/11/1961	Mississippi v. Frieze	3198	S.D. Miss.	Jackson
8/11/1961	Mississippi v. Luster	3199	S.D. Miss.	Jackson
8/11/1961	Mississippi v. Smith	3200	S.D. Miss.	Jackson
12/18/1962	Mississippi v. Crawford	3319	S.D. Miss.	Jackson
10/21/1963	City of Jackson v. Poole	3393	S.D. Miss.	Jackson
11/18/1963	City of Jackson v. Trapp	3405	S.D. Miss.	Jackson
4/3/1964	City of Greenwood v. Peacock	GCR6414	N.D. Miss.	Greenville
4/13/1964	City of Jackson v. Collins	3433	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Austin	3437	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Bennett	3438	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Bennett	3439	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Body	3440	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Brown	3441	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Brown	3442	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Buckley	3443	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Clay	3444	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Davis	3445	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Dawson	3446	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Dawson	3447	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Drain	3448	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Drain	3449	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Evans	3450	S.D. Miss.	Jackson
6/11/1964	Mississippi v. George	3451	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Grant	3452	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Gray	3453	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Hamblin	3454	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Hollis	3455	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Johnson	3456	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Jones	3457	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Levy	3458	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Luckett	3459	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Luckett	3460	S.D. Miss.	Jackson
6/11/1964	Mississippi v. McCullough	3461	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Melton	3462	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Nicholls	3463	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Owens	3464	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Small	3465	S.D. Miss.	Jackson

Removed	*Case Name*	*Docket No.*	*District*	*Division*
6/11/1964	Mississippi v. Shell	3466	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Small	3467	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Thomas	3468	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Walker	3469	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Washington	3470	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Washington	3471	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Washington	3472	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Hewitt	3473	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Smith	3474	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Weaver	3475	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Watts	3476	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Watts	3477	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Palmer	3478	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Palmer	3479	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Myers	3480	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Myers	3481	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Chinn	3482	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Bosley	3483	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Bosley	3484	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Bosley	3485	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Hollander	3486	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Jones	3487	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Jones	3488	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Jewett	3489	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Jewett	3490	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Brown	3491	S.D. Miss.	Jackson
6/11/1964	Mississippi v. McMurty	3492	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Escoe	3493	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Hamblin	3494	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Hollander	3495	S.D. Miss.	Jackson
6/11/1964	Mississippi v. Johnson	3496	S.D. Miss.	Jackson
6/12/1964	Mississippi v. Veal	3497	S.D. Miss.	Jackson
6/12/1964	Mississippi v. Veal	3498	S.D. Miss.	Jackson
6/12/1964	Mississippi v. Mory	3499	S.D. Miss.	Jackson
6/12/1964	Mississippi v. Cole	3500	S.D. Miss.	Jackson
6/12/1964	Mississippi v. Alexander	3501	S.D. Miss.	Jackson
6/12/1964	Mississippi v. Hamblin	3502	S.D. Miss.	Jackson
6/12/1964	Mississippi v. Hamblin	3503	S.D. Miss.	Jackson
6/12/1964	Mississippi v. Merritt	3504	S.D. Miss.	Jackson
6/12/1964	Mississippi v. Chinn	3505	S.D. Miss.	Jackson
6/12/1964	Mississippi v. Merritt	3506	S.D. Miss.	Jackson
6/12/1964	Mississippi v. Blackman	3507	S.D. Miss.	Jackson

Removed	*Case Name*	*Docket No.*	*District*	*Division*
6/12/1964	Mississippi v. Brown	3508	S.D. Miss.	Jackson
6/12/1964	Mississippi v. Bartee	3509	S.D. Miss.	Jackson
6/12/1964	Mississippi v. Hosman	3510	S.D. Miss.	Jackson
6/16/1964	City of Meridian v. Brown	5151	S.D. Miss.	Meridian
6/16/1964	City of Meridian v. Harris	5152	S.D. Miss.	Meridian
6/16/1964	City of Meridian v. Hosley	5153	S.D. Miss.	Meridian
6/16/1964	City of Meridian v. Johnson	5154	S.D. Miss.	Meridian
6/16/1964	City of Meridian v. Jones	5155	S.D. Miss.	Meridian
6/16/1964	City of Meridian v. Packer	5156	S.D. Miss.	Meridian
6/16/1964	City of Meridian v. Smith	5157	S.D. Miss.	Meridian
6/16/1964	City of Meridian v. Waterhouse	5158	S.D. Miss.	Meridian
6/16/1964	City of Meridian v. Watson	5159	S.D. Miss.	Meridian
6/16/1964	City of Meridian v. Jones	5160	S.D. Miss.	Meridian
6/22/1964	Mississippi v. Crawford	3511	S.D. Miss.	Jackson
6/22/1964	Mississippi v. Mitchell	3512	S.D. Miss.	Jackson
6/22/1964	Mississippi v. Mitchell	3513	S.D. Miss.	Jackson
6/22/1964	Mississippi v. Poole	3514	S.D. Miss.	Jackson
6/22/1964	Mississippi v. Salter	3515	S.D. Miss.	Jackson
6/22/1964	Mississippi v. Salter	3516	S.D. Miss.	Jackson
6/22/1964	Mississippi v. Bracey	3517	S.D. Miss.	Jackson
6/22/1964	Mississippi v. Ladner	3518	S.D. Miss.	Jackson
6/22/1964	Mississippi v. Adams	3519	S.D. Miss.	Jackson
6/22/1964	Mississippi v. Armstrong	3520	S.D. Miss.	Jackson
6/22/1964	Mississippi v. Dickey	3521	S.D. Miss.	Jackson
6/22/1964	Mississippi v. Moore	3522	S.D. Miss.	Jackson
6/26/1964	Mississippi v. Hartfield	1305	S.D. Miss.	Hattiesburg
6/26/1964	Mississippi v. Everett	1306	S.D. Miss.	Hattiesburg
6/26/1964	Mississippi v. Bergstresser	1307	S.D. Miss.	Hattiesburg
6/26/1964	Mississippi v. Watters	1308	S.D. Miss.	Hattiesburg
6/26/1964	Mississippi v. Dohrenburg	1309	S.D. Miss.	Hattiesburg
6/26/1964	Mississippi v. Alexander	1310	S.D. Miss.	Hattiesburg
6/26/1964	Mississippi v. Brown	WCR6417	N.D. Miss.	Oxford
6/29/1964	Mississippi v. Brown	ECR6432	N.D. Miss.	Aberdeen
6/30/1964	City of Columbus v. Galloway	ECR6433	N.D. Miss.	Aberdeen
7/6/1964	Mississippi v. Anderson	1311	S.D. Miss.	Hattiesburg
7/6/1964	Mississippi v. Bailey	1312	S.D. Miss.	Hattiesburg
7/6/1964	Mississippi v. Brown	1313	S.D. Miss.	Hattiesburg
7/6/1964	Mississippi v. Cameron	1314	S.D. Miss.	Hattiesburg
7/6/1964	Mississippi v. Campbell	1315	S.D. Miss.	Hattiesburg
7/6/1964	Mississippi v. Conner	1316	S.D. Miss.	Hattiesburg
7/6/1964	Mississippi v. Crosby	1317	S.D. Miss.	Hattiesburg
7/6/1964	Mississippi v. Dantzler	1318	S.D. Miss.	Hattiesburg

Removed	*Case Name*	*Docket No.*	*District*	*Division*
7/6/1964	Mississippi v. Froom	1319	S.D. Miss.	Hattiesburg
7/6/1964	Mississippi v. Hall	1320	S.D. Miss.	Hattiesburg
7/6/1964	Mississippi v. King	1321	S.D. Miss.	Hattiesburg
7/6/1964	Mississippi v. Lawrence	1322	S.D. Miss.	Hattiesburg
7/6/1964	Mississippi v. Mehl	1323	S.D. Miss.	Hattiesburg
7/6/1964	Mississippi v. Murphy	1324	S.D. Miss.	Hattiesburg
7/6/1964	Mississippi v. Parker	1325	S.D. Miss.	Hattiesburg
7/6/1964	Mississippi v. Patton	1326	S.D. Miss.	Hattiesburg
7/6/1964	Mississippi v. Plump	1327	S.D. Miss.	Hattiesburg
7/6/1964	Mississippi v. Robinson	1328	S.D. Miss.	Hattiesburg
7/6/1964	Mississippi v. Simms	1329	S.D. Miss.	Hattiesburg
7/6/1964	Mississippi v. Stokes	1330	S.D. Miss.	Hattiesburg
7/6/1964	Mississippi v. Sullivan	1331	S.D. Miss.	Hattiesburg
7/6/1964	Mississippi v. Vanderveen	1332	S.D. Miss.	Hattiesburg
7/6/1964	Mississippi v. Vaux	1333	S.D. Miss.	Hattiesburg
7/6/1964	City of Jackson v. Lapsy	3525	S.D. Miss.	Jackson
7/6/1964	City of Jackson v. Lewis	3526	S.D. Miss.	Jackson
7/6/1964	City of Jackson v. Lewis	3527	S.D. Miss.	Jackson
7/6/1964	City of Jackson v. Kerk	3528	S.D. Miss.	Jackson
7/6/1964	City of Jackson v. Lee	3529	S.D. Miss.	Jackson
7/6/1964	City of Jackson v. Lee	3530	S.D. Miss.	Jackson
7/6/1964	Mississippi v. King	3531	S.D. Miss.	Jackson
7/6/1964	Mississippi v. Knight	3532	S.D. Miss.	Jackson
7/6/1964	Mississippi v. Jones	3533	S.D. Miss.	Jackson
7/9/1964	Mississippi v. Glushakow	ECR6434	N.D. Miss.	Aberdeen
7/10/1964	Mississippi v. Cameron	1334	S.D. Miss.	Hattiesburg
7/10/1964	Mississippi v. Jackson	1335	S.D. Miss.	Hattiesburg
7/10/1964	Mississippi v. Maxie	1336	S.D. Miss.	Hattiesburg
7/10/1964	Mississippi v. Walker	1337	S.D. Miss.	Hattiesburg
7/10/1964	Mississippi v. Walker	1338	S.D. Miss.	Hattiesburg
7/10/1964	Mississippi v. Wall	1339	S.D. Miss.	Hattiesburg
7/10/1964	Mississippi v. Wallace	1340	S.D. Miss.	Hattiesburg
7/10/1964	Mississippi v. Williams	1341	S.D. Miss.	Hattiesburg
7/13/1964	Mississippi v. Hancock	1342	S.D. Miss.	Hattiesburg
7/13/1964	City of Jackson v. Haynes	3534	S.D. Miss.	Jackson
7/13/1964	City of Jackson v. Hamilton	3535	S.D. Miss.	Jackson
7/13/1964	City of Jackson v. Hartfield	3536	S.D. Miss.	Jackson
7/13/1964	Mississippi v. Hartfield	3537	S.D. Miss.	Jackson
7/13/1964	City of Jackson v. Henry	3538	S.D. Miss.	Jackson
7/13/1964	City of Jackson v. Henry	3539	S.D. Miss.	Jackson
7/13/1964	City of Jackson v. Henry	3540	S.D. Miss.	Jackson
7/14/1964	City of Meridian v. Allen	5168	S.D. Miss.	Meridian

Removed	*Case Name*	*Docket No.*	*District*	*Division*
7/14/1964	City of Meridian v. Ray	5169	S.D. Miss.	Meridian
7/14/1964	City of Meridian v. Knighton	5170	S.D. Miss.	Meridian
7/14/1964	City of Meridian v. Chandler	5171	S.D. Miss.	Meridian
7/14/1964	City of Meridian v. Calhoun	5172	S.D. Miss.	Meridian
7/14/1964	City of Meridian v. Brown	5173	S.D. Miss.	Meridian
7/14/1964	City of Meridian v. Crowell	5174	S.D. Miss.	Meridian
7/14/1964	City of Meridian v. Smith	5175	S.D. Miss.	Meridian
7/14/1964	City of Meridian v. Smith	5176	S.D. Miss.	Meridian
7/14/1964	City of Meridian v. Brown	5177	S.D. Miss.	Meridian
7/14/1964	City of Meridian v. Smith	5178	S.D. Miss.	Meridian
7/14/1964	City of Meridian v. Thomas	5179	S.D. Miss.	Meridian
7/14/1964	City of Meridian v. Watson	5180	S.D. Miss.	Meridian
7/14/1964	City of Meridian v. Brewer	5181	S.D. Miss.	Meridian
7/14/1964	City of Meridian v. Bell	5182	S.D. Miss.	Meridian
7/14/1964	City of Meridian v. Brown	5183	S.D. Miss.	Meridian
7/14/1964	City of Meridian v. Brown	5184	S.D. Miss.	Meridian
7/14/1964	City of Meridian v. Henderson	5185	S.D. Miss.	Meridian
7/14/1964	City of Meridian v. Heidelberg	5186	S.D. Miss.	Meridian
7/14/1964	City of Meridian v. Flowers	5187	S.D. Miss.	Meridian
7/14/1964	City of Meridian v. Rembert	5188	S.D. Miss.	Meridian
7/14/1964	City of Meridian v. Johnson	5189	S.D. Miss.	Meridian
7/14/1964	City of Meridian v. Jones	5190	S.D. Miss.	Meridian
7/14/1964	City of Meridian v. Naylor	5191	S.D. Miss.	Meridian
7/14/1964	City of Meridian v. Rembert	5192	S.D. Miss.	Meridian
7/14/1964	Mississippi v. Miller	8353	S.D. Miss.	Biloxi
7/14/1964	Mississippi v. Goldstein	8354	S.D. Miss.	Biloxi
7/14/1964	Mississippi v. Cleverdon	8355	S.D. Miss.	Biloxi
7/15/1964	City of Clarksdale v. Carmichael	DCR6427	N.D. Miss.	Clarksdale
7/15/1964	Mississippi v. Rayford	DCR6428	N.D. Miss.	Clarksdale
7/17/1964	City of Jackson v. Catchings	3541	S.D. Miss.	Jackson
7/17/1964	City of Jackson v. McNair	3542	S.D. Miss.	Jackson
7/17/1964	Mississippi v. Carmichael	GCR6416	N.D. Miss.	Greenville
7/17/1964	City of Drew v. McNair	GCR6417	N.D. Miss.	Greenville
7/17/1964	City of Drew v. Yarrow	GCR6418	N.D. Miss.	Greenville
7/17/1964	City of Drew v. McLaurin	GCR6419	N.D. Miss.	Greenville
7/17/1964	City of Drew v. Harris	GCR6420	N.D. Miss.	Greenville
7/17/1964	Mississippi v. Carmichael	DCR6430	N.D. Miss.	Clarksdale
7/17/1964	Mississippi v. Biggs	8356	S.D. Miss.	Biloxi
7/17/1964	Mississippi v. Reese	8357	S.D. Miss.	Biloxi
7/20/1964	City of Jackson v. Henry	3543	S.D. Miss.	Jackson
7/20/1964	City of Jackson v. Herring	3544	S.D. Miss.	Jackson
7/20/1964	City of Jackson v. Herring	3545	S.D. Miss.	Jackson

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7/20/1964	City of Jackson v. Herron	3546	S.D. Miss.	Jackson
7/20/1964	City of Greenwood v. Carmichael	GCR6429	N.D. Miss.	Greenville
7/21/1964	City of Drew v. McNair	GCR6430	N.D. Miss.	Greenville
7/21/1964	City of Drew v. Harris	GCR6431	N.D. Miss.	Greenville
7/21/1964	City of Drew v. McLaurin	GCR6432	N.D. Miss.	Greenville
7/21/1964	City of Drew v. McLaurin	GCR6433	N.D. Miss.	Greenville
7/21/1964	City of Drew v. Yarrow	GCR6434	N.D. Miss.	Greenville
7/22/1964	City of Clarksdale v. Gertge	DCR6448	N.D. Miss.	Clarksdale
7/23/1964	Mississippi v. Else	5196	S.D. Miss.	Meridian
7/23/1964	Mississippi v. Else	5197	S.D. Miss.	Meridian
7/23/1964	Mississippi v. Kotz	5198	S.D. Miss.	Meridian
7/23/1964	Mississippi v. Kotz	5199	S.D. Miss.	Meridian
7/23/1964	Mississippi v. Kotz	5200	S.D. Miss.	Meridian
7/23/1964	City of Greenwood v. Weathers	GCR6435	N.D. Miss.	Greenville
7/23/1964	City of Greenwood v. Weathers	GCR6436	N.D. Miss.	Greenville
7/23/1964	City of Greenwood v. Brooks	GCR6437	N.D. Miss.	Greenville
7/23/1964	City of Greenwood v. Albertz	GCR6438	N.D. Miss.	Greenville
7/23/1964	Mississippi v. White	ECR6454	N.D. Miss.	Aberdeen
7/24/1964	Mississippi v. Morton	3547	S.D. Miss.	Jackson
7/24/1964	City of Clarksdale v. Brooks	DCR6449	N.D. Miss.	Clarksdale
7/27/1964	City of Jackson v. Howard	3548	S.D. Miss.	Jackson
7/27/1964	Mississippi v. Horn	3549	S.D. Miss.	Jackson
7/27/1964	City of Jackson v. Horn	3550	S.D. Miss.	Jackson
7/27/1964	Mississippi v. Hossiey	3551	S.D. Miss.	Jackson
7/27/1964	City of Jackson v. Hough	3552	S.D. Miss.	Jackson
7/27/1964	Mississippi v. Hough	3553	S.D. Miss.	Jackson
7/27/1964	City of Meridian v. McGee	5201	S.D. Miss.	Meridian
7/27/1964	City of Holly Springs v. Rubin	WCR6430	N.D. Miss.	Oxford
7/27/1964	City of Holly Springs v. Berry	WCR6431	N.D. Miss.	Oxford
7/27/1964	Mississippi v. Goodloe	DCR6450	N.D. Miss.	Clarksdale
7/28/1964	City of Clarksdale v. Brooks	DCR6451	N.D. Miss.	Clarksdale
7/28/1964	City of Clarksdale v. Johnson	DCR6452	N.D. Miss.	Clarksdale
7/29/1964	Mississippi v. Smith	3554	S.D. Miss.	Jackson
7/31/1964	Town of Byhalia v. Taylor	WCR6432	N.D. Miss.	Oxford
8/3/1964	City of Jackson v. Huff	3556	S.D. Miss.	Jackson
8/3/1964	City of Jackson v. Jackson	3557	S.D. Miss.	Jackson
8/3/1964	Mississippi v. Moman	3558	S.D. Miss.	Jackson
8/3/1964	Mississippi v. Hutchinson	3559	S.D. Miss.	Jackson
8/3/1964	City of Jackson v. Island	3560	S.D. Miss.	Jackson
8/3/1964	City of Jackson v. Howard	3561	S.D. Miss.	Jackson
8/3/1964	City of Greenwood v. Harris	GCR6439	N.D. Miss.	Greenville
8/3/1964	City of Greenwood v. Sharpe	GCR6440	N.D. Miss.	Greenville

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8/3/1964	City of Greenwood v. Paul	GCR6441	N.D. Miss.	Greenville
8/3/1964	City of Greenwood v. Albertz	GCR6442	N.D. Miss.	Greenville
8/3/1964	City of Greenwood v. Albertz	GCR6443	N.D. Miss.	Greenville
8/3/1964	City of Greenwood v. Hodes	GCR6444	N.D. Miss.	Greenville
8/3/1964	City of Greenwood v. McGee	GCR6445	N.D. Miss.	Greenville
8/4/1964	Mississippi v. Foner	3562	S.D. Miss.	Jackson
8/4/1964	Mississippi v. Wright	3563	S.D. Miss.	Jackson
8/4/1964	Mississippi v. Manoff	3564	S.D. Miss.	Jackson
8/4/1964	Mississippi v. Gunn	3565	S.D. Miss.	Jackson
8/4/1964	Mississippi v. Soloff	3566	S.D. Miss.	Jackson
8/4/1964	Mississippi v. Packer	3567	S.D. Miss.	Jackson
8/4/1964	City of Greenwood v. Gordon	GCR6446	N.D. Miss.	Greenville
8/4/1964	City of Greenwood v. Turner	GCR6447	N.D. Miss.	Greenville
8/4/1964	City of Greenwood v. Masters	GCR6448	N.D. Miss.	Greenville
8/6/1964	Mississippi v. Glenn	1344	S.D. Miss.	Hattiesburg
8/7/1964	City of Holly Springs v. Sellers	WCR6437	N.D. Miss.	Oxford
8/7/1964	Mississippi v. Weaver	DCR6453	N.D. Miss.	Clarksdale
8/7/1964	Mississippi v. Graham	DCR6454	N.D. Miss.	Clarksdale
8/8/1964	City of Drew v. Williams	GCR6449	N.D. Miss.	Greenville
8/8/1964	City of Drew v. Miller	GCR6450	N.D. Miss.	Greenville
8/8/1964	City of Marks v. Kassler	DCR6455	N.D. Miss.	Clarksdale
8/10/1964	Mississippi v. Hilligas	3568	S.D. Miss.	Jackson
8/10/1964	Mississippi v. Dennis	3569	S.D. Miss.	Jackson
8/10/1964	City of Jackson v. Jasper	3570	S.D. Miss.	Jackson
8/10/1964	City of Jackson v. Jackson	3571	S.D. Miss.	Jackson
8/10/1964	City of Jackson v. Johnson	3572	S.D. Miss.	Jackson
8/10/1964	City of Jackson v. Jackson	3573	S.D. Miss.	Jackson
8/10/1964	City of Jackson v. Jackson	3574	S.D. Miss.	Jackson
8/10/1964	City of Jackson v. Williams	3575	S.D. Miss.	Jackson
8/10/1964	Mississippi v. Clark	3576	S.D. Miss.	Jackson
8/10/1964	City of Greenwood v. Handy	GCR6451	N.D. Miss.	Greenville
8/13/1964	City of Drew v. Hexter	GCR6452	N.D. Miss.	Greenville
8/13/1964	City of Pascagoula v. Parker	8358	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Reeves	8359	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Watson	8360	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Martin	8361	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Watson	8362	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Liddell	8363	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Walker	8364	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Watson	8365	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Hubbard	8366	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Stallworth	8367	S.D. Miss.	Biloxi

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8/13/1964	City of Pascagoula v. Liddell	8368	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Norwood	8369	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Washington	8370	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Wagner	8371	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Francis	8372	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Burt	8373	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Graves	8374	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Davis	8375	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Jackson	8376	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Booker	8377	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Davis	8378	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Jackson	8379	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Liddelll	8380	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Davis	8381	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. McDonald	8382	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Riley	8383	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Payton	8384	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Stevenson	8385	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Gill	8386	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Tessaro	8387	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Miller	8388	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Watson	8389	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Reeves	8390	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Liddell	8391	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Thompson	8392	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Walker	8393	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Wright	8394	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Gladney	8395	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Ross	8396	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Dickerson	8397	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Riley	8398	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Burton	8399	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Simmons	8400	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Jenkins	8401	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Richburg	8402	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Robinson	8403	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Robinson	8404	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Gill	8405	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Watson	8406	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Lett	8407	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Ross	8408	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Millar	8409	S.D. Miss.	Biloxi

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8/13/1964	City of Pascagoula v. Burton	8410	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. McArthur	8411	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Fountain	8412	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Richardon	8413	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Fagan	8414	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Barnhill	8415	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Jenkins	8416	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Roberts	8417	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Millar	8418	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Bradley	8419	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Davis	8420	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Grandison	8421	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Long	8422	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Lett	8423	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Washington	8424	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Carter	8425	S.D. Miss.	Biloxi
8/13/1964	City of Pascagoula v. Washington	8426	S.D. Miss.	Biloxi
8/17/1964	Mississippi v. O'Neal	3577	S.D. Miss.	Jackson
8/17/1964	Mississippi v. Trumpauer	3578	S.D. Miss.	Jackson
8/17/1964	City of Jackson v. Williams	3579	S.D. Miss.	Jackson
8/17/1964	City of Jackson v. Woods	3580	S.D. Miss.	Jackson
8/17/1964	City of Jackson v. Wilson	3581	S.D. Miss.	Jackson
8/17/1964	City of Jackson v. Griggs	3582	S.D. Miss.	Jackson
8/17/1964	Mississippi v. Wright	3583	S.D. Miss.	Jackson
8/17/1964	City of Jackson v. Rutledge	3584	S.D. Miss.	Jackson
8/17/1964	City of Jackson v. Rutledge	3585	S.D. Miss.	Jackson
8/17/1964	City of Jackson v. Frazier	3586	S.D. Miss.	Jackson
8/17/1964	City of Holly Springs v. Cieciorka	WCR6438	N.D. Miss.	Oxford
8/17/1964	City of Greenwood v. Harrison	GCR6453	N.D. Miss.	Greenville
8/18/1964	City of Greenwood v. Turner	GCR6454	N.D. Miss.	Greenville
8/18/1964	Mississippi v. Harper	GCR6455	N.D. Miss.	Greenville
8/18/1964	Mississippi v. Nelson	GCR6456	N.D. Miss.	Greenville
8/18/1964	Mississippi v. Delaney	GCR6457	N.D. Miss.	Greenville
8/18/1964	Mississippi v. Delaney	GCR6458	N.D. Miss.	Greenville
8/19/1964	City of Hattiesburg v. Achtenberg	1345	S.D. Miss.	Hattiesburg
8/19/1964	City of Hattiesburg v. Adickes	1346	S.D. Miss.	Hattiesburg
8/19/1964	City of Hattiesburg v. Edwards	1347	S.D. Miss.	Hattiesburg
8/19/1964	City of Hattiesburg v. Jackson	1348	S.D. Miss.	Hattiesburg
8/19/1964	City of Hattiesburg v. Jackson	1349	S.D. Miss.	Hattiesburg
8/19/1964	City of Hattiesburg v. Jackson	1350	S.D. Miss.	Hattiesburg
8/19/1964	City of Hattiesburg v. Jones	1351	S.D. Miss.	Hattiesburg
8/19/1964	City of Hattiesburg v. Patterson	1352	S.D. Miss.	Hattiesburg

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8/19/1964	Mississippi v. Bridgeforth	ECR6458	N.D. Miss.	Aberdeen
8/20/1964	Mississippi v. Kendrick	DCR6456	N.D. Miss.	Clarksdale
8/20/1964	City of Ruleville v. Perry	GCR6459	N.D. Miss.	Greenville
8/20/1964	City of Drew v. Smith	GCR6460	N.D. Miss.	Greenville
8/20/1964	City of Indianola v. Hexter	GCR6461	N.D. Miss.	Greenville
8/21/1964	City of Greenwood v. McGhee	GCR6462	N.D. Miss.	Greenville
8/21/1964	City of Greenwood v. Pruitt	GCR6463	N.D. Miss.	Greenville
8/21/1964	City of Greenwood v. Edwards	GCR6464	N.D. Miss.	Greenville
8/21/1964	City of Greenwood v. Handy	GCR6465	N.D. Miss.	Greenville
8/21/1964	City of Greenwood v. Parker	GCR6466	N.D. Miss.	Greenville
8/21/1964	City of Greenwood v. Austin	GCR6467	N.D. Miss.	Greenville
8/21/1964	City of Greenwood v. Craft	GCR6468	N.D. Miss.	Greenville
8/21/1964	City of Greenwood v. Harris	GCR6469	N.D. Miss.	Greenville
8/22/1964	Mississippi v. Holbrook	3587	S.D. Miss.	Jackson
8/22/1964	Mississippi v. Sorenson	3588	S.D. Miss.	Jackson
8/24/1964	Mississippi v. Hartfield	1353	S.D. Miss.	Hattiesburg
8/24/1964	Mississippi v. Nixon	1354	S.D. Miss.	Hattiesburg
8/24/1964	Mississippi v. Stevenson	1355	S.D. Miss.	Hattiesburg
8/24/1964	Mississippi v. McGee	1356	S.D. Miss.	Hattiesburg
8/24/1964	Mississippi v. Martin	1357	S.D. Miss.	Hattiesburg
8/24/1964	Mississippi v. Wilson	1358	S.D. Miss.	Hattiesburg
8/24/1964	Mississippi v. Hathorn	1359	S.D. Miss.	Hattiesburg
8/24/1964	Mississippi v. McDonald	1360	S.D. Miss.	Hattiesburg
8/24/1964	Mississippi v. Rooney	1361	S.D. Miss.	Hattiesburg
8/24/1964	Mississippi v. Jones	1362	S.D. Miss.	Hattiesburg
8/24/1964	Mississippi v. Walker	1363	S.D. Miss.	Hattiesburg
8/24/1964	Mississippi v. Palmer	1364	S.D. Miss.	Hattiesburg
8/24/1964	Mississippi v. Steffenson	1365	S.D. Miss.	Hattiesburg
8/24/1964	City of McComb v. Lee	3589	S.D. Miss.	Jackson
8/24/1964	Town of Anguilla v. Grant	4373	S.D. Miss.	Vicksburg
8/24/1964	Town of Anguilla v. Wright	4374	S.D. Miss.	Vicksburg
8/27/1964	City of Magnolia v. McGhee	3592	S.D. Miss.	Jackson
9/3/1964	Mississippi v. Brisben	ECR6459	N.D. Miss.	Aberdeen
9/9/1964	City of Amory v. Carr	ECR6460	N.D. Miss.	Aberdeen
9/11/1964	City of Jackson v. Camper	3594	S.D. Miss.	Jackson
9/12/1964	City of Indianola v. Brown	GCR6471	N.D. Miss.	Greenville
9/12/1964	City of Indianola v. Scattergood	GCR6472	N.D. Miss.	Greenville
9/12/1964	City of Indianola v. Perry	GCR6473	N.D. Miss.	Greenville
9/12/1964	City of Indianola v. Kaminsky	GCR6474	N.D. Miss.	Greenville
9/12/1964	City of Indianola v. Marshall	GCR6475	N.D. Miss.	Greenville
9/12/1964	City of Indianola v. Dann	GCR6476	N.D. Miss.	Greenville
9/12/1964	City of Indianola v. Harris	GCR6477	N.D. Miss.	Greenville

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9/15/1964	City of Indianola v. Donaldson	GCR6478	N.D. Miss.	Greenville
9/15/1964	City of Indianola v. Smith	GCR6479	N.D. Miss.	Greenville
9/15/1964	City of Indianola v. Brumfield	GCR6480	N.D. Miss.	Greenville
9/15/1964	City of Indianola v. Stewart	GCR6481	N.D. Miss.	Greenville
9/15/1964	City of Indianola v. Frey	GCR6482	N.D. Miss.	Greenville
9/15/1964	City of Indianola v. Williams	GCR6483	N.D. Miss.	Greenville
9/15/1964	City of Indianola v. McGee	GCR6484	N.D. Miss.	Greenville
9/15/1964	City of Indianola v. Hampton	GCR6485	N.D. Miss.	Greenville
9/15/1964	City of Indianola v. Davis	GCR6486	N.D. Miss.	Greenville
9/15/1964	City of Indianola v. Higgins	GCR6487	N.D. Miss.	Greenville
9/15/1964	City of Indianola v. Rogers	GCR6488	N.D. Miss.	Greenville
9/15/1964	City of Indianola v. Brown	GCR6489	N.D. Miss.	Greenville
9/15/1964	City of Indianola v. Jones	GCR6490	N.D. Miss.	Greenville
9/15/1964	City of Indianola v. Bell	GCR6491	N.D. Miss.	Greenville
9/15/1964	City of Indianola v. Taylor	GCR6492	N.D. Miss.	Greenville
9/15/1964	City of Indianola v. Lane	GCR6493	N.D. Miss.	Greenville
9/15/1964	City of Indianola v. Smith	GCR6494	N.D. Miss.	Greenville
9/15/1964	City of Indianola v. Flowers	GCR6495	N.D. Miss.	Greenville
9/15/1964	City of Indianola v. Hughes	GCR6496	N.D. Miss.	Greenville
9/21/1964	City of Jackson v. Thrash	3595	S.D. Miss.	Jackson
9/21/1964	City of Jackson v. Fiering	3596	S.D. Miss.	Jackson
9/21/1964	City of Jackson v. Wickliff	3597	S.D. Miss.	Jackson
9/21/1964	Mississippi v. Scott	DCR6457	N.D. Miss.	Clarksdale
9/22/1964	City of Jackson v. Wickliff	3598	S.D. Miss.	Jackson
9/22/1964	City of Jackson v. Thrash	3599	S.D. Miss.	Jackson
9/22/1964	Mississippi v. Thomas	DCR6458	N.D. Miss.	Clarksdale
9/22/1964	Mississippi v. Palmer	DCR6459	N.D. Miss.	Clarksdale
9/22/1964	Mississippi v. Washington	DCR6460	N.D. Miss.	Clarksdale
9/22/1964	City of Columbus v. Ewen	ECR6466	N.D. Miss.	Aberdeen
9/25/1964	Pike County v. Dillon	3600	S.D. Miss.	Jackson
9/28/1964	Mississippi v. Washington	3601	S.D. Miss.	Jackson
9/28/1964	Mississippi v. Chinn	3602	S.D. Miss.	Jackson
9/28/1964	City of Jackson v. Ferguson	3603	S.D. Miss.	Jackson
9/29/1964	Mississippi v. Lewis	3604	S.D. Miss.	Jackson
9/29/1964	Mississippi v. Ard	3605	S.D. Miss.	Jackson
9/29/1964	Mississippi v. Hills	3606	S.D. Miss.	Jackson
9/29/1964	Mississippi v. Banks	3607	S.D. Miss.	Jackson
9/29/1964	Mississippi v. Mallard	3608	S.D. Miss.	Jackson
9/29/1964	Mississippi v. Tatum	3609	S.D. Miss.	Jackson
9/29/1964	Mississippi v. Thomas	3610	S.D. Miss.	Jackson
9/29/1964	Mississippi v. Ashley	3611	S.D. Miss.	Jackson
9/29/1964	Mississippi v. Thomas	3612	S.D. Miss.	Jackson

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9/29/1964	Mississippi v. Knox	3613	S.D. Miss.	Jackson
9/29/1964	Mississippi v. Anderson	3614	S.D. Miss.	Jackson
9/29/1964	Mississippi v. Tate	3615	S.D. Miss.	Jackson
9/29/1964	Mississippi v. Todd	3616	S.D. Miss.	Jackson
9/29/1964	Mississippi v. Allen	3617	S.D. Miss.	Jackson
10/1/1964	Mississippi v. Caston	3618	S.D. Miss.	Jackson
10/1/1964	Mississippi v. Caston	3619	S.D. Miss.	Jackson
10/1/1964	Mississippi v. Allen	3620	S.D. Miss.	Jackson
10/1/1964	Mississippi v. Allen	3621	S.D. Miss.	Jackson
10/1/1964	Mississippi v. Stone	3622	S.D. Miss.	Jackson
10/1/1964	Mississippi v. Beachman	3623	S.D. Miss.	Jackson
10/1/1964	County of Neshora v. Schiffman	5202	S.D. Miss.	Meridian
10/2/1964	City of Belzoni v. Myles	GCR6498	N.D. Miss.	Greenville
10/2/1964	City of Belzoni v. Myles	GCR6499	N.D. Miss.	Greenville
10/2/1964	Town of Sunflower v. Donn	GCR64100	N.D. Miss.	Greenville
10/7/1964	Mississippi v. Harvey	3624	S.D. Miss.	Jackson
10/9/1964	City of Jackson v. Thrash	3628	S.D. Miss.	Jackson
10/12/1964	Mississippi v. Parker	3629	S.D. Miss.	Jackson
10/12/1964	Mississippi v. Parker	3630	S.D. Miss.	Jackson
10/12/1964	Mississippi v. Allen	3631	S.D. Miss.	Jackson
10/12/1964	Mississippi v. Lewis	3632	S.D. Miss.	Jackson
10/12/1964	Mississippi v. Caston	3633	S.D. Miss.	Jackson
10/12/1964	Mississippi v. Allen	3634	S.D. Miss.	Jackson
10/14/1964	Mississippi v. Marsalis	3635	S.D. Miss.	Jackson
10/20/1964	Mississippi v. Bridgeforth	ECR6473	N.D. Miss.	Aberdeen
10/28/1964	City of Jackson v. Smith	3638	S.D. Miss.	Jackson
10/28/1964	City of Jackson v. Coggeshall	3639	S.D. Miss.	Jackson
10/28/1964	City of Jackson v. Gillon	3640	S.D. Miss.	Jackson
10/28/1964	City of Jackson v. Park	3641	S.D. Miss.	Jackson
10/28/1964	City of Jackson v. Burnham	3642	S.D. Miss.	Jackson
10/28/1964	City of Jackson v. Brown	3643	S.D. Miss.	Jackson
10/28/1964	City of Jackson v. Cotton	3644	S.D. Miss.	Jackson
10/28/1964	Mississippi v. Bass	GCR64102	N.D. Miss.	Greenville
10/28/1964	Mississippi v. Ware	GCR64103	N.D. Miss.	Greenville
10/28/1964	Mississippi v. Carpenter	GCR64104	N.D. Miss.	Greenville
11/2/1964	City of Canton v. Raymond	3647	S.D. Miss.	Jackson
11/4/1964	City of Jackson v. McHugh	3648	S.D. Miss.	Jackson
11/5/1964	Mississippi v. Robinson	ECR6474	N.D. Miss.	Aberdeen
11/5/1964	Mississippi v. Robinson	ECR6475	N.D. Miss.	Aberdeen
11/5/1964	Mississippi v. Williamson	ECR6476	N.D. Miss.	Aberdeen
11/5/1964	Mississippi v. Williamson	ECR6477	N.D. Miss.	Aberdeen
11/5/1964	Mississippi v. Williamson	ECR6478	N.D. Miss.	Aberdeen

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11/6/1964	City of West Point v. Brooks	ECR6479	N.D. Miss.	Aberdeen
11/6/1964	City of West Point v. Bernard	ECR6480	N.D. Miss.	Aberdeen
11/6/1964	City of West Point v. Gilman	ECR6481	N.D. Miss.	Aberdeen
11/6/1964	City of West Point v. Bell	ECR6482	N.D. Miss.	Aberdeen
11/6/1964	City of West Point v. Lewis	ECR6483	N.D. Miss.	Aberdeen
11/6/1964	Mississippi v. Schrader	ECR6484	N.D. Miss.	Aberdeen
11/6/1964	City of Indianola v. Smith	GCR64105	N.D. Miss.	Greenville
11/6/1964	City of Indianola v. McGee	GCR64106	N.D. Miss.	Greenville
11/6/1964	City of Indianola v. Winter	GCR64107	N.D. Miss.	Greenville
11/6/1964	City of Indianola v. Brown	GCR64108	N.D. Miss.	Greenville
11/6/1964	City of Indianola v. Williams	GCR64109	N.D. Miss.	Greenville
11/6/1964	City of Indianola v. McKinley	GCR64110	N.D. Miss.	Greenville
11/9/1964	City of Meridian v. Golick	5210	S.D. Miss.	Meridian
11/9/1964	City of Meridian v. Gross	5211	S.D. Miss.	Meridian
11/9/1964	City of Meridian v. Henderson	5212	S.D. Miss.	Meridian
11/9/1964	City of Meridian v. Kemmerer	5213	S.D. Miss.	Meridian
11/9/1964	City of Meridian v. Lowenstein	5214	S.D. Miss.	Meridian
11/9/1964	City of Columbus v. Phillips	ECR6485	N.D. Miss.	Aberdeen
11/9/1964	City of Columbus v. Schulman	ECR6486	N.D. Miss.	Aberdeen
11/27/1964	City of Columbus v. Kashiwagi	ECR6487	N.D. Miss.	Aberdeen
11/27/1964	City of Columbus v. Edmands	ECR6488	N.D. Miss.	Aberdeen
11/30/1964	City of Columbus v. Buckly	ECR6489	N.D. Miss.	Aberdeen
11/30/1964	City of Columbus v. Hamburg	ECR6490	N.D. Miss.	Aberdeen
12/7/1964	Mississippi v. Darden	3652	S.D. Miss.	Jackson
12/7/1964	Mississippi v. Delott	3653	S.D. Miss.	Jackson
12/9/1964	Mississippi v. Trapp	3654	S.D. Miss.	Jackson
12/9/1964	Mississippi v. Palmore	3655	S.D. Miss.	Jackson
12/9/1964	Mississippi v. Cole	3656	S.D. Miss.	Jackson
12/9/1964	Mississippi v. White	3657	S.D. Miss.	Jackson
12/9/1964	Mississippi v. Nixon	3658	S.D. Miss.	Jackson
12/9/1964	Mississippi v. Morton	3659	S.D. Miss.	Jackson
12/9/1964	Mississippi v. Meeks	3660	S.D. Miss.	Jackson
12/9/1964	Mississippi v. Haughland	3661	S.D. Miss.	Jackson
12/9/1964	Mississippi v. Glass	3662	S.D. Miss.	Jackson
12/9/1964	Mississippi v. Hall	3663	S.D. Miss.	Jackson
12/9/1964	Mississippi v. Craun	3664	S.D. Miss.	Jackson
12/9/1964	Mississippi v. Badentscher	3665	S.D. Miss.	Jackson
12/14/1964	City of Columbus v. Maurer	ECR6491	N.D. Miss.	Aberdeen
12/21/1964	City of Laurel v. Everett	1369	S.D. Miss.	Hattiesburg
12/21/1964	City of Laurel v. Foster	1370	S.D. Miss.	Hattiesburg
12/21/1964	City of Laurel v. Hartfield	1371	S.D. Miss.	Hattiesburg
12/21/1964	City of Laurel v. Hardaway	1372	S.D. Miss.	Hattiesburg

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12/21/1964	City of Laurel v. Jackson	1373	S.D. Miss.	Hattiesburg
12/21/1964	City of Laurel v. McGauley	1374	S.D. Miss.	Hattiesburg
12/24/1964	Mississippi v. Perry	GCR64111	N.D. Miss.	Greenville
1/4/1965	Mississippi v. Jewett	3667	S.D. Miss.	Jackson
1/4/1965	Mississippi v. Jewett	3668	S.D. Miss.	Jackson
1/4/1965	Mississippi v. Jones	3669	S.D. Miss.	Jackson
1/4/1965	Mississippi v. Jones	3670	S.D. Miss.	Jackson
1/4/1965	Mississippi v. Merritt	3671	S.D. Miss.	Jackson
1/4/1965	Mississippi v. Merritt	3672	S.D. Miss.	Jackson
1/4/1965	Mississippi v. Myers	3673	S.D. Miss.	Jackson
1/4/1965	Mississippi v. Myers	3674	S.D. Miss.	Jackson
1/4/1965	Mississippi v. Veal	3675	S.D. Miss.	Jackson
1/4/1965	Mississippi v. Veal	3676	S.D. Miss.	Jackson
1/4/1965	Mississippi v. Palmer	3677	S.D. Miss.	Jackson
1/4/1965	Mississippi v. Palmer	3678	S.D. Miss.	Jackson
1/4/1965	Mississippi v. Watts	3679	S.D. Miss.	Jackson
1/4/1965	Mississippi v. Bosley	3680	S.D. Miss.	Jackson
1/4/1965	Mississippi v. Bosley	3681	S.D. Miss.	Jackson
1/4/1965	Mississippi v. Bosley	3682	S.D. Miss.	Jackson
1/11/1965	City of Vicksburg v. Jackson	4375	S.D. Miss.	Vicksburg
1/11/1965	City of Vicksburg v. Johnson	4376	S.D. Miss.	Vicksburg
1/11/1965	City of Vicksburg v. Coleman	4377	S.D. Miss.	Vicksburg
1/13/1965	City of Vicksburg v. Davis	4378	S.D. Miss.	Vicksburg
1/13/1965	Mississippi v. Green	ECR6520	N.D. Miss.	Aberdeen
1/13/1965	City of West Point v. Crawford	ECR6521	N.D. Miss.	Aberdeen
1/13/1965	City of West Point v. Sykes	ECR6522	N.D. Miss.	Aberdeen
1/13/1965	City of West Point v. Brooks	ECR6523	N.D. Miss.	Aberdeen
1/13/1965	City of West Point v. Shanklin	ECR6524	N.D. Miss.	Aberdeen
1/13/1965	City of West Point v. Higson	ECR6525	N.D. Miss.	Aberdeen
1/13/1965	City of West Point v. Wilson	ECR6526	N.D. Miss.	Aberdeen
1/13/1965	City of West Point v. Gilman	ECR6527	N.D. Miss.	Aberdeen
1/13/1965	City of West Point v. Gilman	ECR6528	N.D. Miss.	Aberdeen
1/13/1965	City of West Point v. Brown	ECR6529	N.D. Miss.	Aberdeen
1/13/1965	City of West Point v. Buffington	ECR6530	N.D. Miss.	Aberdeen
1/15/1965	City of Natchez v. Clark	4393	S.D. Miss.	Vicksburg
1/15/1965	City of Natchez v. Washington	4394	S.D. Miss.	Vicksburg
1/15/1965	City of Natchez v. Avery	4395	S.D. Miss.	Vicksburg
1/15/1965	City of Natchez v. Jemmott	4396	S.D. Miss.	Vicksburg
1/15/1965	City of Natchez v. Atdkins	4397	S.D. Miss.	Vicksburg
1/15/1965	City of Natchez v. Green	4398	S.D. Miss.	Vicksburg
1/15/1965	City of Natchez v. Cress	4399	S.D. Miss.	Vicksburg
1/15/1965	City of Natchez v. Williams	4400	S.D. Miss.	Vicksburg

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1/15/1965	City of Natchez v. Gilmore	4401	S.D. Miss.	Vicksburg
1/15/1965	City of Natchez v. Easton	4402	S.D. Miss.	Vicksburg
1/15/1965	City of Natchez v. McFarland	4403	S.D. Miss.	Vicksburg
1/15/1965	City of Natchez v. Martin	4404	S.D. Miss.	Vicksburg
1/16/1965	Mississippi v. Raymond	3700	S.D. Miss.	Jackson
1/20/1965	Mississippi v. Ruffin	1382	S.D. Miss.	Hattiesburg
1/26/1965	Mississippi v. Carver	ECR6531	N.D. Miss.	Aberdeen
2/2/1965	City of Columbus v. Higson	ECR6532	N.D. Miss.	Aberdeen
2/17/1965	City of Indianola v. Winn	GCR6515	N.D. Miss.	Greenville
3/2/1965	Mississippi v. Kaslo	5219	S.D. Miss.	Meridian
3/3/1965	City of Meridian v. Kaslo	5220	S.D. Miss.	Meridian
3/3/1965	City of Meridian v. Crowell	5221	S.D. Miss.	Meridian
3/3/1965	City of Meridian v. Harris	5222	S.D. Miss.	Meridian
3/3/1965	City of Meridian v. Smith	5223	S.D. Miss.	Meridian
3/3/1965	City of Meridian v. Coleman	5224	S.D. Miss.	Meridian
3/3/1965	City of Meridian v. Wright	5225	S.D. Miss.	Meridian
3/3/1965	City of Meridian v. Brown	5226	S.D. Miss.	Meridian
3/3/1965	City of Meridian v. Moss	5227	S.D. Miss.	Meridian
3/3/1965	City of Meridian v. Morse	5228	S.D. Miss.	Meridian
3/3/1965	City of Meridian v. Knighton	5229	S.D. Miss.	Meridian
3/3/1965	City of Meridian v. Tinsley	5230	S.D. Miss.	Meridian
3/3/1965	City of Meridian v. Smith	5231	S.D. Miss.	Meridian
3/3/1965	City of Meridian v. Black	5232	S.D. Miss.	Meridian
3/3/1965	City of Meridian v. Wright	5233	S.D. Miss.	Meridian
3/3/1965	City of Meridian v. Black	5234	S.D. Miss.	Meridian
3/9/1965	City of Indianola v. Brown	GCR6518	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Dann	GCR6519	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Harris	GCR6520	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Jenkins	GCR6521	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Kaminsky	GCR6522	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Mack	GCR6523	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Mack	GCR6524	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Scattergood	GCR6525	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Brown	GCR6526	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Dann	GCR6527	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Goree	GCR6528	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Jenkins	GCR6529	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Kaminsky	GCR6530	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Mack	GCR6531	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Cooper	GCR6532	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Giles	GCR6533	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Jones	GCR6534	N.D. Miss.	Greenville

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3/9/1965	City of Indianola v. Stanford	GCR6535	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Tyler	GCR6536	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Herman	GCR6537	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Gerald	GCR6538	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Campbell	GCR6539	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Johnson	GCR6540	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Day	GCR6541	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Mathews	GCR6542	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Plummer	GCR6543	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Weeks	GCR6544	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Cole	GCR6545	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Howard	GCR6546	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Bowie	GCR6547	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Brownlow	GCR6548	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Gerald	GCR6549	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Smith	GCR6550	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Williams	GCR6551	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Branigan	GCR6552	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. White	GCR6553	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Jenkins	GCR6554	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Porter	GCR6555	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Harris	GCR6556	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. King	GCR6557	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Nolen	GCR6558	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Leonard	GCR6559	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Scattergood	GCR6560	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Rice	GCR6561	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Harris	GCR6562	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Newell	GCR6563	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Scattergood	GCR6564	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Washington	GCR6565	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Flemning	GCR6566	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Drain	GCR6567	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Parker	GCR6568	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Rome	GCR6569	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Smith	GCR6570	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Humpries	GCR6571	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Rome	GCR6572	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Blakely	GCR6573	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Parker	GCR6574	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Williams	GCR6575	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Sims	GCR6576	N.D. Miss.	Greenville

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3/9/1965	City of Indianola v. Wilson	GCR6577	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Phillips	GCR6578	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Clark	GCR6579	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. McClain	GCR6580	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. McCarthy	GCR6581	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Phelps	GCR6582	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Branigan	GCR6583	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Myles	GCR6584	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Denton	GCR6585	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Sims	GCR6586	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Hatchett	GCR6587	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Nixon	GCR6588	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Rice	GCR6589	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Brown	GCR6590	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Wilson	GCR6591	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Sanders	GCR6592	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Jones	GCR6593	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. McClain	GCR6594	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Winston	GCR6595	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Clay	GCR6596	N.D. Miss.	Greenville
3/9/1965	City of Indianola v. Wilson	GCR6597	N.D. Miss.	Greenville
3/11/1965	City of Marks v. Goodner	DCR6515	N.D. Miss.	Clarksdale
3/11/1965	City of Marks v. Bateman	DCR6516	N.D. Miss.	Clarksdale
3/12/1965	City of Batesville v. O'Connor	DCR6517	N.D. Miss.	Clarksdale
3/12/1965	City of Batesville v. Williams	DCR6518	N.D. Miss.	Clarksdale
3/12/1965	City of Batesville v. Braxton	DCR6519	N.D. Miss.	Clarksdale
3/12/1965	City of Batesville v. Johnson	DCR6520	N.D. Miss.	Clarksdale
3/12/1965	City of Batesville v. Cathey	DCR6521	N.D. Miss.	Clarksdale
3/12/1965	City of Batesville v. Eskridge	DCR6522	N.D. Miss.	Clarksdale
3/12/1965	City of Batesville v. Donner	DCR6523	N.D. Miss.	Clarksdale
3/12/1965	City of Batesville v. Lee	DCR6524	N.D. Miss.	Clarksdale
3/12/1965	City of Batesville v. Webb	DCR6525	N.D. Miss.	Clarksdale
3/12/1965	City of Batesville v. Johnson	DCR6526	N.D. Miss.	Clarksdale
3/12/1965	City of Batesville v. Jackson	DCR6527	N.D. Miss.	Clarksdale
3/12/1965	City of Batesville v. Jackson	DCR6528	N.D. Miss.	Clarksdale
3/12/1965	City of Indianola v. Seese	GCR6598	N.D. Miss.	Greenville
3/12/1965	City of Indianola v. Kaminsky	GCR6599	N.D. Miss.	Greenville
3/12/1965	City of Indianola v. Scattergood	GCR65100	N.D. Miss.	Greenville
3/12/1965	City of Indianola v. Smith	GCR65101	N.D. Miss.	Greenville
3/12/1965	City of Indianola v. Dann	GCR65102	N.D. Miss.	Greenville
3/12/1965	City of Indianola v. Davis	GCR65103	N.D. Miss.	Greenville
3/15/1965	Mississippi v. Larsen	8497	S.D. Miss.	Biloxi

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3/15/1965	Mississippi v. Montgomery	8498	S.D. Miss.	Biloxi
3/15/1965	Mississippi v. Sours	8499	S.D. Miss.	Biloxi
3/15/1965	Mississippi v. Simmon	8500	S.D. Miss.	Biloxi
3/15/1965	Mississippi v. Shanahan	8501	S.D. Miss.	Biloxi
3/15/1965	Mississippi v. Liddell	8502	S.D. Miss.	Biloxi
3/15/1965	Mississippi v. Liddell	8503	S.D. Miss.	Biloxi
3/15/1965	Mississippi v. Parker	8504	S.D. Miss.	Biloxi
3/15/1965	Mississippi v. Simmon	8505	S.D. Miss.	Biloxi
3/15/1965	Mississippi v. Kelly	8506	S.D. Miss.	Biloxi
3/15/1965	Mississippi v. Flowers	8507	S.D. Miss.	Biloxi
3/15/1965	Mississippi v. Liddell	8508	S.D. Miss.	Biloxi
3/15/1965	Mississippi v. McCoveroy	8509	S.D. Miss.	Biloxi
3/15/1965	Mississippi v. Montgomery	8510	S.D. Miss.	Biloxi
3/15/1965	Mississippi v. Montgomery	8511	S.D. Miss.	Biloxi
3/15/1965	Mississippi v. Jackson	8512	S.D. Miss.	Biloxi
3/15/1965	Mississippi v. Grant	8513	S.D. Miss.	Biloxi
3/15/1965	Mississippi v. Martin	8514	S.D. Miss.	Biloxi
3/15/1965	Mississippi v. Sellers	8515	S.D. Miss.	Biloxi
3/15/1965	Mississippi v. Sellers	8516	S.D. Miss.	Biloxi
3/15/1965	Mississippi v. David	8517	S.D. Miss.	Biloxi
3/15/1965	Mississippi v. Agenew	8518	S.D. Miss.	Biloxi
3/15/1965	Mississippi v. Colley	8519	S.D. Miss.	Biloxi
3/15/1965	Mississippi v. Kelly	8520	S.D. Miss.	Biloxi
3/15/1965	Mississippi v. Bass	8521	S.D. Miss.	Biloxi
3/15/1965	Mississippi v. Grandison	8522	S.D. Miss.	Biloxi
3/22/1965	City of Marks v. Sigel	DCR6530	N.D. Miss.	Clarksdale
3/25/1965	Mississippi v. Davis	4405	S.D. Miss.	Vicksburg
3/25/1965	Mississippi v. Hansen	4406	S.D. Miss.	Vicksburg
3/25/1965	Mississippi v. Easton	4407	S.D. Miss.	Vicksburg
3/25/1965	Mississippi v. Jammont	4408	S.D. Miss.	Vicksburg
3/25/1965	Mississippi v. Bell	4409	S.D. Miss.	Vicksburg
3/25/1965	Mississippi v. Fitzgerald	4410	S.D. Miss.	Vicksburg
3/25/1965	Mississippi v. Green	4411	S.D. Miss.	Vicksburg
3/25/1965	Mississippi v. Martin	4412	S.D. Miss.	Vicksburg
3/29/1965	City of Vicksburg v. Dunlap	4413	S.D. Miss.	Vicksburg
3/29/1965	City of Vicksburg v. Dunlap	4414	S.D. Miss.	Vicksburg
3/29/1965	City of Vicksburg v. Green	4415	S.D. Miss.	Vicksburg
3/29/1965	City of Vicksburg v. Lerner	4416	S.D. Miss.	Vicksburg
3/29/1965	City of Vicksburg v. Washington	4417	S.D. Miss.	Vicksburg
3/29/1965	City of Vicksburg v. Lucero	4418	S.D. Miss.	Vicksburg
3/29/1965	City of Vicksburg v. Ellis	4419	S.D. Miss.	Vicksburg
3/31/1965	City of Greenville v. Novick	GCR65104	N.D. Miss.	Greenville

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3/31/1965	City of Greenville v. Bynum	GCR65105	N.D. Miss.	Greenville
3/31/1965	City of Greenville v. Bynum	GCR65106	N.D. Miss.	Greenville
3/31/1965	City of Greenville v. Chisolm	GCR65107	N.D. Miss.	Greenville
3/31/1965	City of Greenville v. Chisolm	GCR65108	N.D. Miss.	Greenville
3/31/1965	City of Greenville v. Chisolm	GCR65109	N.D. Miss.	Greenville
3/31/1965	City of Greenville v. Chisolm	GCR65110	N.D. Miss.	Greenville
3/31/1965	City of Greenville v. Quinn	GCR65111	N.D. Miss.	Greenville
3/31/1965	City of Greenville v. Quinn	GCR65112	N.D. Miss.	Greenville
3/31/1965	City of Greenville v. Gibson	GCR65113	N.D. Miss.	Greenville
3/31/1965	City of Greenville v. Johnson	GCR65114	N.D. Miss.	Greenville
3/31/1965	City of Greenville v. Howard	GCR65115	N.D. Miss.	Greenville
3/31/1965	City of Greenville v. Morton	GCR65116	N.D. Miss.	Greenville
3/31/1965	City of Greenville v. Jackson	GCR65117	N.D. Miss.	Greenville
3/31/1965	City of Greenville v. Peterson	GCR65118	N.D. Miss.	Greenville
3/31/1965	City of Greenville v. Banks	GCR65119	N.D. Miss.	Greenville
3/31/1965	City of Greenville v. Dixon	GCR65120	N.D. Miss.	Greenville
3/31/1965	City of Greenville v. Tyler	GCR65121	N.D. Miss.	Greenville
3/31/1965	City of Greenville v. Mitchell	GCR65122	N.D. Miss.	Greenville
3/31/1965	City of Greenville v. Watkins	GCR65123	N.D. Miss.	Greenville
3/31/1965	City of Greenville v. Walker	GCR65124	N.D. Miss.	Greenville
3/31/1965	City of Greenville v. Chandler	GCR65125	N.D. Miss.	Greenville
3/31/1965	City of Greenville v. Packard	GCR65126	N.D. Miss.	Greenville
3/31/1965	City of Greenville v. Vail	GCR65127	N.D. Miss.	Greenville
3/31/1965	City of Greenville v. McNeill	GCR65128	N.D. Miss.	Greenville
3/31/1965	City of Greenville v. Walker	GCR65129	N.D. Miss.	Greenville
3/31/1965	City of Greenville v. Smith	GCR65130	N.D. Miss.	Greenville
3/31/1965	City of Greenville v. Allen	GCR65131	N.D. Miss.	Greenville
3/31/1965	City of Greenville v. Farrar	GCR65132	N.D. Miss.	Greenville
3/31/1965	City of Greenville v. Rollins	GCR65133	N.D. Miss.	Greenville
4/6/1965	City of Indianola v. Cableton	GCR65134	N.D. Miss.	Greenville
4/9/1965	Mississippi v. Bateman	DCR6533	N.D. Miss.	Clarksdale
4/9/1965	Mississippi v. Williams	DCR6534	N.D. Miss.	Clarksdale
4/9/1965	Mississippi v. Williams	DCR6535	N.D. Miss.	Clarksdale
4/12/1965	City of Batesville v. Webb	DCR6536	N.D. Miss.	Clarksdale
4/12/1965	City of Batesville v. Williams	DCR6537	N.D. Miss.	Clarksdale
4/12/1965	City of Batesville v. Lee	DCR6538	N.D. Miss.	Clarksdale
4/12/1965	City of Batesville v. Johnson	DCR6539	N.D. Miss.	Clarksdale
4/12/1965	City of Batesville v. Johnson	DCR6540	N.D. Miss.	Clarksdale
4/12/1965	City of Batesville v. Jackson	DCR6541	N.D. Miss.	Clarksdale
4/12/1965	City of Batesville v. Eskridge	DCR6542	N.D. Miss.	Clarksdale
4/12/1965	City of Batesville v. Donner	DCR6543	N.D. Miss.	Clarksdale
4/12/1965	City of Batesville v. Cathey	DCR6544	N.D. Miss.	Clarksdale

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4/12/1965	City of Batesville v. Braxton	DCR6545	N.D. Miss.	Clarksdale
4/12/1965	City of Batesville v. O'Connor	DCR6546	N.D. Miss.	Clarksdale
4/12/1965	City of Batesville v. Jackson	DCR6547	N.D. Miss.	Clarksdale
4/16/1965	Mississippi v. Montgomery	3728	S.D. Miss.	Jackson
4/16/1965	Mississippi v. Montgomery	3729	S.D. Miss.	Jackson
4/16/1965	Mississippi v. Montgomery	3730	S.D. Miss.	Jackson
4/19/1965	Mississippi v. Haggeart	DCR6548	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Ware	DCR6549	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. James	DCR6550	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Jones	DCR6551	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Ware	DCR6552	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Turner	DCR6553	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Mitchell	DCR6554	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Thomas	DCR6555	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Turner	DCR6556	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Jakes	DCR6557	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Hawkins	DCR6558	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Hawkins	DCR6559	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Jones	DCR6560	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Greenwood	DCR6561	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Hope	DCR6562	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Riles	DCR6563	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Turner	DCR6564	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Collins	DCR6565	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Collins	DCR6566	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Mays	DCR6567	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Fowler	DCR6568	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Loston	DCR6569	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Singleton	DCR6570	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Griggs	DCR6571	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Robinson	DCR6572	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Thomas	DCR6573	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Robinson	DCR6574	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Curry	DCR6575	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Williams	DCR6576	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Rancher	DCR6577	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Dunbar	DCR6578	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Collins	DCR6579	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Lott	DCR6580	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Singleton	DCR6581	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Jackson	DCR6582	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Gellatly	DCR6583	N.D. Miss.	Clarksdale

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4/19/1965	Mississippi v. Weil	DCR6584	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. James	DCR6585	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Collins	DCR6586	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Ware	DCR6587	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Clayborn	DCR6588	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Pratt	DCR6589	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Smith	DCR6590	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Chambers	DCR6591	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Martin	DCR6592	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Williams	DCR6593	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Crawford	DCR6594	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Lark	DCR6595	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Clayborn	DCR6596	N.D. Miss.	Clarksdale
4/19/1965	Mississippi v. Shelton	DCR6597	N.D. Miss.	Clarksdale
4/19/1965	City of Moss Point v. Reeves	8528	S.D. Miss.	Biloxi
4/19/1965	City of Moss Point v. Sellers	8529	S.D. Miss.	Biloxi
4/19/1965	City of Moss Point v. McKeller	8530	S.D. Miss.	Biloxi
4/19/1965	City of Moss Point v. Larsen	8531	S.D. Miss.	Biloxi
4/19/1965	City of Moss Point v. Sours	8532	S.D. Miss.	Biloxi
4/19/1965	City of Moss Point v. Bass	8533	S.D. Miss.	Biloxi
4/23/1965	Mississippi v. Allen	3733	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Brumfield	3734	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Banks	3735	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Vaughn	3736	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Berry	3737	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Martin	3738	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Reed	3739	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Gordon	3740	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Martin	3741	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Ellzey	3742	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Martin	3743	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Martin	3744	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Vick	3745	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Magee	3746	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Eubanks	3747	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Lyons	3748	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Beacham	3749	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Jackson	3750	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Dillon	3751	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Campbell	3752	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Campbell	3753	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Crossley	3754	S.D. Miss.	Jackson

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4/23/1965	Mississippi v. Martin	3755	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Travis	3756	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Cook	3757	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Lee	3758	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Morgan	3759	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Lea	3760	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Beacham	3761	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Martin	3762	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Holmes	3763	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Eubanks	3764	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Joseph	3765	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Reed	3766	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Dillon	3767	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Ledbetter	3768	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Williams	3769	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Quinn	3770	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Martin	3771	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Ward	3772	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Williams	3773	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Berry	3774	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Givens	3775	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Reed	3776	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Woods	3777	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Lea	3778	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Crossley	3779	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Ward	3780	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Eubanks	3781	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Banks	3782	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Vaughn	3783	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Quinn	3784	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Quinn	3785	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Gordon	3786	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Coleman	3787	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Johnson	3788	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Lyons	3789	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Vick	3790	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Martin	3791	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Ellzey	3792	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Morgan	3793	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Eubanks	3794	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Martin	3795	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Foster	3796	S.D. Miss.	Jackson

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4/23/1965	Mississippi v. Brumfield	3797	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Cook	3798	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Quinn	3799	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Harris	3800	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Brown	3801	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Hughes	3802	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Bowie	3803	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Jenkins	3804	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Gantz	3805	S.D. Miss.	Jackson
4/23/1965	Mississippi v. Lee	3806	S.D. Miss.	Jackson
4/26/1965	City of Jackson v. Sumrall	3807	S.D. Miss.	Jackson
4/26/1965	City of Jackson v. Killingworth	3808	S.D. Miss.	Jackson
4/26/1965	City of Jackson v. Irving	3809	S.D. Miss.	Jackson
4/26/1965	City of Jackson v. McKenzie	3810	S.D. Miss.	Jackson
4/26/1965	City of Jackson v. Morgan	3811	S.D. Miss.	Jackson
4/26/1965	City of Jackson v. Miller	3812	S.D. Miss.	Jackson
4/26/1965	City of Jackson v. Marshall	3813	S.D. Miss.	Jackson
4/26/1965	City of Jackson v. Crowell	3814	S.D. Miss.	Jackson
4/26/1965	City of Jackson v. Killingworth	3815	S.D. Miss.	Jackson
4/26/1965	City of Jackson v. Smith	3816	S.D. Miss.	Jackson
4/26/1965	City of Jackson v. Hand	3817	S.D. Miss.	Jackson
4/26/1965	City of Jackson v. Black	3818	S.D. Miss.	Jackson
4/26/1965	Mississippi v. Johnson	3819	S.D. Miss.	Jackson
4/29/1965	City of Moorhead v. Allen	GCR65136	N.D. Miss.	Greenville
4/29/1965	City of Moorhead v. Scattergood	GCR65137	N.D. Miss.	Greenville
4/29/1965	City of Moorhead v. Strong	GCR65138	N.D. Miss.	Greenville
5/7/1965	City of Moorhead v. Scattergood	GCR65139	N.D. Miss.	Greenville
5/11/1965	City of Jackson v. Klein	3820	S.D. Miss.	Jackson
5/11/1965	City of Jackson v. Smith	3821	S.D. Miss.	Jackson
5/11/1965	City of Jackson v. Palmer	3822	S.D. Miss.	Jackson
5/11/1965	City of Jackson v. Brown	3823	S.D. Miss.	Jackson
5/11/1965	City of Jackson v. Brown	3824	S.D. Miss.	Jackson
6/4/1965	City of Natchez v. Day	4421	S.D. Miss.	Vicksburg
6/4/1965	City of Natchez v. Henry	4422	S.D. Miss.	Vicksburg
6/4/1965	City of Natchez v. Thompson	4423	S.D. Miss.	Vicksburg
6/4/1965	City of Natchez v. Campbell	4424	S.D. Miss.	Vicksburg
6/4/1965	City of Natchez v. Shannon	4425	S.D. Miss.	Vicksburg
6/4/1965	City of Natchez v. Shannon	4426	S.D. Miss.	Vicksburg
6/4/1965	City of Natchez v. Leonard	4427	S.D. Miss.	Vicksburg
6/4/1965	City of Natchez v. Muilenberg	4428	S.D. Miss.	Vicksburg
6/4/1965	City of Natchez v. Tucker	4429	S.D. Miss.	Vicksburg
6/4/1965	City of Natchez v. Williams	4430	S.D. Miss.	Vicksburg

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6/4/1965	City of Natchez v. Clay	4431	S.D. Miss.	Vicksburg
6/4/1965	City of Natchez v. Easton	4432	S.D. Miss.	Vicksburg
6/4/1965	City of Natchez v. Watkins	4433	S.D. Miss.	Vicksburg
6/4/1965	City of Natchez v. Shannon	4434	S.D. Miss.	Vicksburg
6/4/1965	City of Natchez v. Knight	4435	S.D. Miss.	Vicksburg
6/4/1965	City of Natchez v. Chapman	4436	S.D. Miss.	Vicksburg
6/4/1965	City of Natchez v. Morris	4437	S.D. Miss.	Vicksburg
6/4/1965	City of Natchez v. Bridgewater	4438	S.D. Miss.	Vicksburg
6/4/1965	City of Natchez v. Boswell	4439	S.D. Miss.	Vicksburg
6/4/1965	City of Natchez v. Parker	4440	S.D. Miss.	Vicksburg
6/4/1965	City of Natchez v. Knight	4441	S.D. Miss.	Vicksburg
6/4/1965	City of Natchez v. Ellis	4442	S.D. Miss.	Vicksburg
6/4/1965	City of Natchez v. McFarland	4443	S.D. Miss.	Vicksburg
6/4/1965	City of Natchez v. Monroe	4444	S.D. Miss.	Vicksburg
6/4/1965	City of Natchez v. Lee	4445	S.D. Miss.	Vicksburg
6/4/1965	City of Natchez v. Fitzgerald	4446	S.D. Miss.	Vicksburg
6/4/1965	City of Natchez v. Ellis	4447	S.D. Miss.	Vicksburg
6/4/1965	City of Natchez v. Shannon	4448	S.D. Miss.	Vicksburg
6/4/1965	City of Natchez v. Wilson	4449	S.D. Miss.	Vicksburg
6/4/1965	City of Natchez v. Fleming	4450	S.D. Miss.	Vicksburg
6/8/1965	City of Jackson v. Weiss	3832	S.D. Miss.	Jackson
6/8/1965	Mississippi v. Divans	3833	S.D. Miss.	Jackson
6/8/1965	Mississippi v. Scott	3834	S.D. Miss.	Jackson
6/8/1965	Mississippi v. Scott	3835	S.D. Miss.	Jackson
6/8/1965	Mississippi v. Smith	3836	S.D. Miss.	Jackson
6/8/1965	Mississippi v. Sweeney	3837	S.D. Miss.	Jackson
6/8/1965	Mississippi v. Lewis	3838	S.D. Miss.	Jackson
6/8/1965	Mississippi v. Jenkins	3839	S.D. Miss.	Jackson
6/8/1965	Mississippi v. Allen	3840	S.D. Miss.	Jackson
6/8/1965	Mississippi v. Pate	3841	S.D. Miss.	Jackson
6/8/1965	Mississippi v. Junk	3842	S.D. Miss.	Jackson
6/11/1965	Mississippi v. Scudder	WCR6522	N.D. Miss.	Oxford
6/11/1965	Mississippi v. Frye	WCR6523	N.D. Miss.	Oxford
6/24/1965	Mississippi v. Miles	DCR65102	N.D. Miss.	Clarksdale
6/25/1965	Mississippi v. McGee	DCR65103	N.D. Miss.	Clarksdale
6/25/1965	Mississippi v. King	DCR65104	N.D. Miss.	Clarksdale
6/25/1965	Mississippi v. King	DCR65105	N.D. Miss.	Clarksdale
7/6/1965	Mississippi v. Carver	DCR65109	N.D. Miss.	Clarksdale
7/6/1965	Mississippi v. Kemp	DCR65110	N.D. Miss.	Clarksdale
7/12/1965	Mississippi v. Bass	3849	S.D. Miss.	Jackson
7/12/1965	Mississippi v. Wilcox	3850	S.D. Miss.	Jackson
7/12/1965	Mississippi v. Klein	3851	S.D. Miss.	Jackson

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7/20/1965	Mississippi v. Archie	3852	S.D. Miss.	Jackson
8/2/1965	Mississippi v. De Rienzis	GCR65148	N.D. Miss.	Greenville
8/11/1965	Mississippi v. Blackman	GCR65149	N.D. Miss.	Greenville
8/11/1965	Town of Drew v. Davis	GCR65150	N.D. Miss.	Greenville
8/19/1965	Mississippi v. Feinglass	WCR6531	N.D. Miss.	Oxford
8/19/1965	Mississippi v. Brown	DCR65127	N.D. Miss.	Clarksdale
8/19/1965	City of Indianola v. Brown	GCR65151	N.D. Miss.	Greenville
8/25/1965	Mississippi v. Ramsland	8540	S.D. Miss.	Biloxi
8/25/1965	Mississippi v. Karpe	8541	S.D. Miss.	Biloxi
8/25/1965	Mississippi v. Karpe	8542	S.D. Miss.	Biloxi
8/25/1965	Mississippi v. Bass	8543	S.D. Miss.	Biloxi
8/25/1965	Mississippi v. Bass	8544	S.D. Miss.	Biloxi
8/25/1965	Mississippi v. Ramsland	8545	S.D. Miss.	Biloxi
8/26/1965	Mississippi v. Chinn	3868	S.D. Miss.	Jackson
8/27/1965	Mississippi v. Brown	3869	S.D. Miss.	Jackson
8/31/1965	City of Natchez v. Easton	4451	S.D. Miss.	Vicksburg
9/3/1965	Mississippi v. Barber	3870	S.D. Miss.	Jackson
9/3/1965	Mississippi v. Levy	5237	S.D. Miss.	Meridian
9/3/1965	Mississippi v. Morse	5238	S.D. Miss.	Meridian
9/3/1965	Mississippi v. Morse	5239	S.D. Miss.	Meridian
9/3/1965	Mississippi v. Halprin	ECR6565	N.D. Miss.	Aberdeen
9/13/1965	City of Natchez v. Black	4452	S.D. Miss.	Vicksburg
9/15/1965	City of Drew v. Mack	GCR65153	N.D. Miss.	Greenville
9/16/1965	City of Natchez v. Roddy	4453	S.D. Miss.	Vicksburg
9/16/1965	City of Natchez v. Jackson	4454	S.D. Miss.	Vicksburg
9/17/1965	Mississippi v. Cummings	3871	S.D. Miss.	Jackson
9/23/1965	City of Holly Springs v. Jelinek	WCR6533	N.D. Miss.	Oxford
9/23/1965	City of Holly Springs v. Walker	WCR6534	N.D. Miss.	Oxford
9/23/1965	City of Holly Springs v. Kuenzli	WCR6535	N.D. Miss.	Oxford
9/23/1965	Mississippi v. Kuenzli	WCR6536	N.D. Miss.	Oxford
9/23/1965	City of Holly Springs v. Harvey	WCR6537	N.D. Miss.	Oxford
9/28/1965	Mississippi v. Cotton	DCR65131	N.D. Miss.	Clarksdale
9/29/1965	Mississippi v. Good	ECR6567	N.D. Miss.	Aberdeen
10/8/1965	City of Natchez v. Burns	4455	S.D. Miss.	Vicksburg
10/8/1965	City of Natchez v. Stone	4456	S.D. Miss.	Vicksburg
10/8/1965	City of Ashland v. Beckley	WCR6538	N.D. Miss.	Oxford
10/20/1965	Mississippi v. Bromberg	3874	S.D. Miss.	Jackson
10/20/1965	Mississippi v. Raymond	3875	S.D. Miss.	Jackson
10/20/1965	Mississippi v. Durham	3876	S.D. Miss.	Jackson
10/20/1965	Mississippi v. Hoover	3877	S.D. Miss.	Jackson
10/20/1965	Mississippi v. Howze	3878	S.D. Miss.	Jackson
10/20/1965	Mississippi v. Howze	3879	S.D. Miss.	Jackson

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10/25/1965	City of Jackson v. Ross	3880	S.D. Miss.	Jackson
10/28/1965	City of Natchez v. Goodman	4457	S.D. Miss.	Vicksburg
10/28/1965	Mississippi v. Green	4458	S.D. Miss.	Vicksburg
11/3/1965	Mississippi v. Bartley	DCR65132	N.D. Miss.	Clarksdale
11/8/1965	Mississippi v. Barber	3881	S.D. Miss.	Jackson
11/8/1965	Mississippi v. Baldwin	4459	S.D. Miss.	Vicksburg
11/8/1965	Mississippi v. McFarland	4460	S.D. Miss.	Vicksburg
11/8/1965	City of Natchez v. Shields	4461	S.D. Miss.	Vicksburg
11/8/1965	Mississippi v. Stampley	4462	S.D. Miss.	Vicksburg
11/22/1965	Mississippi v. Chrisfield	4463	S.D. Miss.	Vicksburg
11/22/1965	Mississippi v. Smith	5240	S.D. Miss.	Meridian
11/22/1965	Mississippi v. Sumrall	5241	S.D. Miss.	Meridian
11/23/1965	Mississippi v. Glover	3883	S.D. Miss.	Jackson
11/23/1965	Mississippi v. Bumgarner	DCR65137	N.D. Miss.	Clarksdale
11/26/1965	Mississippi v. Sours	5242	S.D. Miss.	Meridian
11/26/1965	Mississippi v. Harris	5243	S.D. Miss.	Meridian
12/1/1965	City of Natchez v. Murray	4464	S.D. Miss.	Vicksburg
12/23/1965	Natchez Jitney Jungle v. NAACP	4467	S.D. Miss.	Vicksburg
12/27/1965	Mississippi v. Lopez	3911	S.D. Miss.	Jackson
12/27/1965	Town of Carthage v. Lewis	3912	S.D. Miss.	Jackson
12/29/1965	City of Cleveland v. Davis	DCR65142	N.D. Miss.	Clarksdale
1/3/1966	City of Canton v. Chinn	3913	S.D. Miss.	Jackson
1/3/1966	City of Canton v. Chinn	3914	S.D. Miss.	Jackson
1/3/1966	City of Canton v. Craft	3915	S.D. Miss.	Jackson
1/3/1966	City of Canton v. Chinn	3916	S.D. Miss.	Jackson
1/4/1966	Mississippi v. Martin	3917	S.D. Miss.	Jackson
1/7/1966	Mississippi v. Hamer	3918	S.D. Miss.	Jackson
1/17/1966	Mississippi v. Grupper	1393	S.D. Miss.	Hattiesburg
1/17/1966	Mississippi v. McClendon	1394	S.D. Miss.	Hattiesburg
1/17/1966	Mississippi v. Styles	1395	S.D. Miss.	Hattiesburg
1/27/1966	Mississippi v. Howard	4468	S.D. Miss.	Vicksburg
3/11/1966	Mississippi v. Thomas	3928	S.D. Miss.	Jackson
3/11/1966	Mississippi v. Herzenburg	3929	S.D. Miss.	Jackson
3/11/1966	Mississippi v. Brown	3930	S.D. Miss.	Jackson
3/11/1966	Mississippi v. Rogne	3931	S.D. Miss.	Jackson
3/11/1966	Mississippi v. Thurow	3932	S.D. Miss.	Jackson
3/29/1966	City of Holly Springs v. McGee	WCR667	N.D. Miss.	Oxford
4/6/1966	Mississippi v. Rogers	3936	S.D. Miss.	Jackson
4/11/1966	Mississippi v. Faucette	3937	S.D. Miss.	Jackson
4/14/1966	Mississippi v. Wright	WCR669	N.D. Miss.	Oxford
4/14/1966	Mississippi v. Wright	WCR6610	N.D. Miss.	Oxford
4/14/1966	Mississippi v. Wright	WCR6611	N.D. Miss.	Oxford

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4/21/1966	Mississippi v. Gordon	3941	S.D. Miss.	Jackson
4/21/1966	Mississippi v. Howze	3942	S.D. Miss.	Jackson
4/26/1966	Mississippi v. Richmond	ECR6627	N.D. Miss.	Aberdeen
5/4/1966	City of West Point v. Amous	ECR6632	N.D. Miss.	Aberdeen
5/4/1966	City of West Point v. Bell	ECR6633	N.D. Miss.	Aberdeen
5/5/1966	Mississippi v. Frentz	5263	S.D. Miss.	Meridian
5/5/1966	Mississippi v. Frentz	5264	S.D. Miss.	Meridian
5/5/1966	Mississippi v. Frentz	5265	S.D. Miss.	Meridian
5/5/1966	Mississippi v. Boal	5266	S.D. Miss.	Meridian
5/11/1966	City of West Point v. Hampton	ECR6637	N.D. Miss.	Aberdeen
5/11/1966	City of West Point v. Lockard	ECR6638	N.D. Miss.	Aberdeen
5/11/1966	City of West Point v. Adams	ECR6639	N.D. Miss.	Aberdeen
5/11/1966	City of West Point v. McFarland	ECR6640	N.D. Miss.	Aberdeen
5/11/1966	City of West Point v. Wilson	ECR6641	N.D. Miss.	Aberdeen
5/11/1966	City of West Point v. Buffington	ECR6642	N.D. Miss.	Aberdeen
5/11/1966	City of West Point v. McGauley	ECR6643	N.D. Miss.	Aberdeen
5/11/1966	City of West Point v. Thomas	ECR6644	N.D. Miss.	Aberdeen
5/11/1966	City of West Point v. Brown	ECR6645	N.D. Miss.	Aberdeen
5/11/1966	City of West Point v. Thomas	ECR6646	N.D. Miss.	Aberdeen
5/11/1966	City of West Point v. Adkins	ECR6647	N.D. Miss.	Aberdeen
5/11/1966	City of West Point v. Henderson	ECR6648	N.D. Miss.	Aberdeen
5/11/1966	City of West Point v. Fowler	ECR6649	N.D. Miss.	Aberdeen
5/11/1966	City of West Point v. Fowler	ECR6650	N.D. Miss.	Aberdeen
5/11/1966	City of West Point v. Thomas	ECR6651	N.D. Miss.	Aberdeen
5/11/1966	City of West Point v. Thomas	ECR6652	N.D. Miss.	Aberdeen
5/11/1966	City of West Point v. Thomas	ECR6653	N.D. Miss.	Aberdeen
5/11/1966	City of West Point v. Thomas	ECR6654	N.D. Miss.	Aberdeen
5/11/1966	City of West Point v. Thomas	ECR6655	N.D. Miss.	Aberdeen
5/11/1966	City of West Point v. Buffington	ECR6656	N.D. Miss.	Aberdeen
5/19/1966	Town of Port Gibson v. Williams	4473	S.D. Miss.	Vicksburg
5/19/1966	Town of Port Gibson v. Trevillion	4474	S.D. Miss.	Vicksburg
5/20/1966	Mississippi v. Cohen	ECR6660	N.D. Miss.	Aberdeen
6/13/1966	Mississippi v. Miles	3947	S.D. Miss.	Jackson
6/13/1966	Mississippi v. Miles	3948	S.D. Miss.	Jackson
6/13/1966	Mississippi v. Miles	3949	S.D. Miss.	Jackson
6/13/1966	Mississippi v. Miles	3950	S.D. Miss.	Jackson
6/15/1966	Mississippi v. Bass	4476	S.D. Miss.	Vicksburg
8/19/1966	City of Grenada v. Nash	CRW6661	N.D. Miss.	Oxford
8/19/1966	City of Grenada v. Sims	CRW6662	N.D. Miss.	Oxford
8/19/1966	City of Grenada v. Durr	CRW6663	N.D. Miss.	Oxford
8/19/1966	City of Grenada v. Guess	CRW6664	N.D. Miss.	Oxford
8/19/1966	City of Grenada v. Gay	CRW6665	N.D. Miss.	Oxford

Removed	*Case Name*	*Docket No.*	*District*	*Division*
8/19/1966	City of Grenada v. Lee	CRW6666	N.D. Miss.	Oxford
8/19/1966	City of Grenada v. Willis	CRW6667	N.D. Miss.	Oxford
9/2/1966	City of Grenada v. Knott	CRW6669	N.D. Miss.	Oxford
9/2/1966	City of Grenada v. Sims	CRW6670	N.D. Miss.	Oxford
9/9/1966	City of Grenada v. Bolden	CRW6671	N.D. Miss.	Oxford
9/9/1966	Mississippi v. Cottonreader	CRW6672	N.D. Miss.	Oxford
9/15/1966	Mississippi v. Williamson	CRW6677	N.D. Miss.	Oxford
9/16/1966	Mississippi v. Frentz	CRE6678	N.D. Miss.	Aberdeen
9/16/1966	City of Kosciusko v. Frentz	CRE6679	N.D. Miss.	Aberdeen
9/19/1966	Mississippi v. Frentz	CRE6680	N.D. Miss.	Aberdeen
10/14/1966	City of Amory v. Smithhart	CRE66110	N.D. Miss.	Aberdeen
12/7/1966	Mississippi v. Jeffery	8669	S.D. Miss.	Biloxi
12/7/1966	Mississippi v. Stepp	8670	S.D. Miss.	Biloxi
1/6/1967	Mississippi v. Raymond	3998	S.D. Miss.	Jackson
2/1/1967	Mississippi v. Johnson	CRW6729	N.D. Miss.	Oxford
2/14/1967	Mississippi v. Maedke	CRG6734	N.D. Miss.	Greenville
7/13/1967	Mississippi v. Dodge	CRW6781	N.D. Miss.	Oxford
9/7/1967	City of Clarksdale v. Carter	CRD67130	N.D. Miss.	Clarksdale
11/17/1967	Mississippi v. Haberfeld	4072	S.D. Miss.	Jackson
11/17/1967	Mississippi v. Reiss	4073	S.D. Miss.	Jackson
12/5/1967	City of Cleveland v. McMath	CRD67156	N.D. Miss.	Clarksdale
9/5/1968	Mississippi v. Cottenreader	CRW68164	N.D. Miss.	Oxford
9/5/1968	Mississippi v. Pegues	CRW68165	N.D. Miss.	Oxford
9/5/1968	Mississippi v. Robinson	CRW68166	N.D. Miss.	Oxford
12/2/1968	Mississippi v. Ray	4161	S.D. Miss.	Jackson
12/2/1968	Mississippi v. Ray	4162	S.D. Miss.	Jackson
12/2/1968	Mississippi v. Ray	4163	S.D. Miss.	Jackson
12/9/1968	Mississippi v. Ray	4181	S.D. Miss.	Jackson
2/20/1969	Mississippi v. Redmond	CRW6926	N.D. Miss.	Oxford
2/20/1969	Mississippi v. Redmond	CRW6927	N.D. Miss.	Oxford
3/17/1969	City of Greenwood v. Evans	CRG6930	N.D. Miss.	Greenville
6/23/1969	City of Jackson v. Ross	4199	S.D. Miss.	Jackson
6/23/1969	City of Jackson v. Parker	4200	S.D. Miss.	Jackson
6/23/1969	City of Jackson v. Aschenbrenner	4201	S.D. Miss.	Jackson
7/8/1969	City of Tupelo v. Clayton	CRE6957	N.D. Miss.	Aberdeen
7/8/1969	City of Tupelo v. Underwood	CRE6958	N.D. Miss.	Aberdeen
7/8/1969	City of Tupelo v. Simmons	CRE6959	N.D. Miss.	Aberdeen
7/8/1969	City of Tupelo v. Lynk	CRE6960	N.D. Miss.	Aberdeen
7/8/1969	City of Tupelo v. Whitley	CRE6961	N.D. Miss.	Aberdeen
7/8/1969	City of Tupelo v. Gillespie	CRE6962	N.D. Miss.	Aberdeen
7/8/1969	City of Tupelo v. Rackley	CRE6963	N.D. Miss.	Aberdeen
7/8/1969	City of Tupelo v. Smothers	CRE6964	N.D. Miss.	Aberdeen

Removed	*Case Name*	*Docket No.*	*District*	*Division*
7/8/1969	City of Tupelo v. Easterling	CRE6965	N.D. Miss.	Aberdeen
7/22/1969	Mississippi v. Reaume	4204	S.D. Miss.	Jackson
7/22/1969	Mississippi v. Trest	4205	S.D. Miss.	Jackson
7/22/1969	Mississippi v. Trest	4206	S.D. Miss.	Jackson
7/22/1969	Mississippi v. Trest	4207	S.D. Miss.	Jackson
7/28/1969	Mississippi v. Gorenflo	4208	S.D. Miss.	Jackson
7/31/1969	Mississippi v. Smith	4211	S.D. Miss.	Jackson
7/31/1969	Mississippi v. Smith	4212	S.D. Miss.	Jackson
8/6/1969	Mississippi v. Reaume	4213	S.D. Miss.	Jackson
8/6/1969	Mississippi v. Reaume	4214	S.D. Miss.	Jackson
8/29/1969	Mississippi v. Reaume	4217	S.D. Miss.	Jackson
8/29/1969	Mississippi v. Reaume	4218	S.D. Miss.	Jackson
8/29/1969	Mississippi v. Smith	4219	S.D. Miss.	Jackson
8/29/1969	Mississippi v. Smith	4220	S.D. Miss.	Jackson
8/29/1969	Mississippi v. Smith	4221	S.D. Miss.	Jackson
9/4/1969	Mississippi v. Delaney	CRW6997	N.D. Miss.	Oxford
9/9/1969	Mississippi v. Davis	4223	S.D. Miss.	Jackson
9/24/1969	Mississippi v. Reaume	4225	S.D. Miss.	Jackson
9/25/1969	Mississippi v. Trest	4226	S.D. Miss.	Jackson
9/25/1969	Mississippi v. Trest	4227	S.D. Miss.	Jackson
9/25/1969	Mississippi v. Trest	4228	S.D. Miss.	Jackson
11/6/1969	Mississippi v. Harrington	4253	S.D. Miss.	Jackson
11/6/1969	Mississippi v. Harrington	4254	S.D. Miss.	Jackson
11/7/1969	Mississippi v. Clark	CRD69142	N.D. Miss.	Clarksdale
11/7/1969	Mississippi v. Clark	CRD69143	N.D. Miss.	Clarksdale
12/17/1969	Mississippi v. Alexander	4514	S.D. Miss.	Vicksburg
12/17/1969	Mississippi v. Willis	4515	S.D. Miss.	Vicksburg
12/23/1969	Mississippi v. Alexander	4516	S.D. Miss.	Vicksburg

ESSAY

SURVEILLING DISABILITY, HARMING INTEGRATION

*Prianka Nair**

Scholars, policymakers, and the media acknowledge that surveillance can threaten privacy and increase the risk of discrimination. Surveillance of people with disabilities, however, is positioned as being a convenient way of averting a host of problems: It can be seen as a way to protect people with disabilities from abuse and neglect, to prevent Medicaid fraud, and to proactively protect school communities from mass shootings. Increasingly, as surveillance systems become more sophisticated, state and federal laws have begun sanctioning, and occasionally mandating, the surveillance of people with disabilities for these purposes.

This Essay interrogates narratives that justify the increased surveillance of people with disabilities by analyzing them through the lens of the Americans With Disabilities Act (ADA) and its integration mandate. The ADA expresses a clear goal of preventing the unnecessary segregation and isolation of people with disabilities. To achieve this aim, states must provide services, programs, and activities in the most integrated setting possible. Looking at laws and policies that mandate surveillance through the lens of integration draws attention to their oppressive and isolating effects.

This Essay breaks new ground by centering disability discrimination in its analysis of surveillance. It is the first to demonstrate how ostensibly benevolent surveillance systems embed punitive, carceral practices within therapeutic and community-based settings. It yields new insights about how surveillance systems deployed within a community can result in a constrained and superficial, rather than expansive, idea of integration.

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INTRODUCTION

In February 2022, New York City Mayor Eric Adams unveiled a new plan to get unhoused people off the streets, out of the subway system, and into hospital beds.[1] The plan is multipronged and involves "grow[ing] the number of acute psychiatric beds" at hospitals,[2] criminalizing conduct like sleeping in subway cars,[3] and increasing police presence in subway stations.[4] This plan expands surveillance of unhoused people with disabilities in New York City by increasing police oversight in public spaces[5] and permitting information sharing between city agencies to facilitate hospitalization and treatment of people who are deemed unable to meet their "basic needs."[6] It could result in the involuntary institutionalization

1. City of N.Y., The Subway Safety Plan 4 (2022), https://www.nyc.gov/assets/home/downloads/pdf/press-releases/2022/the-subway-safety-plan.pdf [https://perma.cc/9F7T-4V4S] [hereinafter City of N.Y., Subway Safety Plan] ("We must immediately help New Yorkers struggling to take the first step towards a better future—a journey that the City will coordinate every step of the way, from their first moment out of the station to ongoing care and a permanent home."); see also Eric Adams & Jessica Katz, Housing Our Neighbors: A Blueprint for Housing and Homelessness 47 (2022), https://www.nyc.gov/assets/home/downloads/pdf/office-of-the-mayor/2022/Housing-Blueprint.pdf [https://perma.cc/Q64P-EUEN] ("In February 2022, with the release of the Subway Safety Plan, the Adams administration announced cross-agency outreach initiatives to better connect with unsheltered residents and help them access shelter options that work for them.").

2. City of N.Y., Subway Safety Plan, supra note 1, at 13.

3. See id. at 6–7 (noting that there will be increased police presence at subway stations to enforce Metropolitan Transit Authority (MTA) and New York City Transit Authority (NYCTA) rules that prohibit "[l]ying down, sleeping, or outstretching in a way that takes up more than one seat per passenger or interferes with fellow passengers").

4. See id. at 7 ("More than 1,000 additional officers have already been deployed across the system."); see also Adams & Katz, supra note 1, at 47 (noting that "the Adams administration announced cross-agency outreach initiatives to better connect with unsheltered residents").

5. See City of N.Y., Subway Safety Plan, supra note 1, at 7.

6. See Mental Health Involuntary Removals, City of N.Y. (Nov. 28, 2022), https://www.nyc.gov/assets/home/downloads/pdf/press-releases/2022/Mental-Health-Involuntary-Removals.pdf [https://perma.cc/4PVW-QZ32] [hereinafter City of N.Y., Involuntary Removals] ("If the circumstances support an objectively reasonable basis to conclude that the person appears to have a mental illness and cannot support their basic

of many people who do not pose a danger to the community.[7] In proffering this plan, Adams's rhetoric is a curious mix of punitive and therapeutic. The program will, he argues, discharge a duty of care toward vulnerable people with disabilities.[8] But targeted New Yorkers will not have a choice about whether to accept the government's intervention. Rather, Adams ominously informed unhoused New Yorkers: "No more just doing whatever you want. No, those days are over."[9]

Mayor Adams is not alone in his impulse to watch and control. Actors at all levels of government are increasingly pursuing policies that use surveillance mechanisms to manage people with disabilities. Over the past decade, state and federal laws have started to permit, and occasionally mandate, the increased surveillance of people with disabilities. These surveillance practices are a continuation of a historical trend of the oversurveillance of people with disabilities. Branded as criminals[10] and scrutinized with suspicion because of their dependence on public aid,[11]

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human needs to an extent that causes them harm, they may be removed for an evaluation."); see also City of N.Y., Subway Safety Plan, supra note 1, at 8 (outlining New York City's multiagency effort to "expand[] services to reach those experiencing homelessness or severe mental illness").

7. See City of N.Y., Involuntary Removals, supra note 6 ("[New York law] authorize[s] the removal of a person who appears to be mentally ill and displays an inability to meet basic living needs, even when no recent dangerous act has been observed.").

8. See Press Release, Off. of the Mayor, Mayor Adams Releases Subway Safety Plan, Says Safe Subway Is Prerequisite for New York City's Recovery (Feb. 18, 2022), https://www.nyc.gov/office-of-the-mayor/news/087-22/mayor-adams-releases-subway-safety-plan-says-safe-subway-prerequisite-new-york-city-s#/0 [https://perma.cc/PDR6-QV9P] ("It is cruel and inhumane to allow unhoused people to live on the subway . . . . The days of turning a blind eye to this growing problem are over . . . ." (internal quotation marks omitted) (quoting Eric Adams, Mayor, N.Y.C.)).

9. Gwynne Hogan, Adams, Hochul Roll Out Subway Safety Plan to Crack Down on Homeless People on Trains and in Stations, Gothamist (Feb. 18, 2022), https://gothamist.com/news/adams-hochul-roll-out-subway-safety-plan-crack-down-homeless-trains-and-stations (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting Eric Adams, Mayor, N.Y.C.).

10. See, e.g., Kim E. Nielsen, A Disability History of the United States 102 (2012) (noting that institutions like the Indiana Reformatory were developed to manage the population of the "degenerate class," which included "most of the insane, the epileptic, the imbecile, [and] the idiotic," among others (internal quotation marks omitted) (quoting Jennifer Terry, An American Obsession: Science, Medicine, and Homosexuality in Modern Society 82 (1999))); Susan M. Schweik, The Ugly Laws: Disability in Public 10 (2009) (describing the broad network of public ordinances that were passed in various major U.S. cities criminalizing disability in public spaces, which were rooted in early poorhouse laws used to confine convicted people in police stations or county poorhouses); James W. Trent, Jr., Inventing the Feeble Mind: A History of Intellectual Disability in the United States 13 (2017) (observing that intellectual disability was historically linked to a multitude of sins requiring oversight and management, including "intemperance, poverty, consanguinity (meaning marriage between cousins), insanity, scrofula, consumption, licentious habits, failed attempts at abortion, and overwork in the quest for wealth and power").

11. One of the earliest institutions was the workhouse or poorhouse, created to confine various diverse but poor populations, including the "disabled, widowed, orphaned,

those labeled as disabled were subject to surveillance, removed from public spaces,[12] and funneled into penitentiaries, prisons, residential schools, and workhouses to be managed, worked, and treated.[13] Once within these institutionalized spaces, surveillance was critical to the mission of correcting or rehabilitating "abnormal" behavior.[14] Those who were excluded from the workhouse, including enslaved and colonized people, were wrapped up in other punitive systems of "unrestrained violence" that also used totalizing surveillance to control and manage.[15] Policies that promoted the isolation and segregation of people with disabilities remained in place until well into the twentieth century.[16]

In the mid-twentieth century, social policy shifted from isolating people with disabilities in large institutions to closing those institutions

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and sick." See Chris Chapman, Allison C. Carey & Liat Ben-Moshe, Reconsidering Confinement: Interlocking Locations and Logics of Incarceration, *in* Disability Incarcerated: Imprisonment and Disability in the United States and Canada 3, 3–4 (Liat Ben-Moshe, Chris Chapman & Allison C. Carey eds., 2014).

12. Schweik, supra note 10, at 26 ("With an almshouse in place, street cleaning could proceed, justified—when proper—as caretaking."). Professor Liat Ben-Moshe provides a more modern example of surveillance of people with disabilities in public spaces, namely the deliberate counting and categorizing of the "'homeless mentally ill.'" Liat Ben-Moshe, Decarcerating Disability: Deinstitutionalization and Prison Abolition 140–43 (2020) [hereinafter Ben-Moshe, Decarcerating Disability]. This is a "constructed category of analysis" that is part of a process of justifying the incarceration of this population in hospitals and prisons. Id. at 140.

13. See Chapman et al., supra note 11, at 4–5 (noting that the purpose of confining people with disabilities changed in the nineteenth century from undifferentiated placement in the poorhouse to more intentional placement in places like asylums, hospitals, and residential schools, where people with disabilities could be treated and cured); David J. Rothman, The Discovery of the Asylum 79 (Aldine de Gruyter 2002) (1971) (writing that reformation was the goal of the penitentiary, which was built to house people deemed "deviant" and had the lofty aims of reforming criminality and thereby stabilizing American society).

14. Asylums and schools for people with intellectual and developmental disabilities were sites of constant monitoring. See, e.g., Dolly MacKinnon, Hearing Madness and Sounding Cures: Recovering Historical Soundscapes of the Asylum, Politiques de Communication (Special Issue), no. 1, 2017, at 77, 78 (Fr.) ("[W]omen and men were physically segregated, and their medical appraisal and diagnosis involved an account of their visual and auditory symptoms of madness. The soundscape within the asylum was monitored at all times, as the watchful eyes and ears of both attendants and doctors made notes of any changes.").

15. Chapman et al., supra note 11, at 4. For a more detailed analysis of the surveillance practices employed against enslaved people, see Simone Browne, Dark Matters: On the Surveillance of Blackness 21 (2015) (noting that at the time of slavery, "citizenry (the watchers) was deputized through white supremacy to apprehend any fugitive who escaped from bondage (the watched), making for a cumulative white gaze that functioned as a totalizing surveillance").

16. Laura I. Appleman, Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration, 68 Duke L.J. 417, 440 (2018) (noting that laws in the early twentieth century still called for the incarceration of "feebleminded" adults "in hopes of preventing crime, insanity and prostitution").

and integrating people with disabilities into the community.[17] Integration was first codified in section 504 of the Rehabilitation Act of 1973 (Section 504)[18] and then in the Americans With Disabilities Act of 1990 (ADA).[19] These statutes mandated that states and entities receiving federal funding provide people with disabilities services within the "most integrated setting" appropriate for the individual's needs.[20] The move toward community integration was given an additional boost when the Supreme Court decided *Olmstead v. L.C. ex rel. Zimring*, a landmark case interpreting the ADA's integration mandate.[21] The Court held unequivocally that people with disabilities have a right to live within their communities and receive services in the most integrated setting possible.[22] Integration entailed a seismic shift in thinking about the position, both geographical and social, occupied by people with disabilities in society.[23] If surveillance was an important characteristic of the institutions that warehoused people with disabilities to control and cure them,[24] integration called for protecting the privacy, autonomy, and freedom of people with disabilities so that they could live a "normal" life within the community.[25]

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17. See, e.g., Ben-Moshe, Decarcerating Disability, supra note 12, at 44 (noting that mental health and intellectual and developmental disability (I/DD) policy changes that culminated in deinstitutionalization began with broader social welfare reforms in the 1960s, including the establishment of Medicare and Medicaid); cf. State ex rel. Goddard v. Coerver, 412 P.2d 259, 261–62 (Ariz. 1966) (discussing the state legislature's approval of new funds for an "Insane Asylum" in 1885).

18. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794(a) (2018)).

19. Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2018)).

20. See 42 U.S.C. § 12182(b)(1)(B).

21. 527 U.S. 581 (1999).

22. See id. at 597 ("Unjustified isolation, we hold, is properly regarded as discrimination based on disability.").

23. Ben-Moshe, Decarcerating Disability, supra note 12, at 39 (referring to deinstitutionalization as "a *social* movement, an ideology opposing carceral logics, a mindset").

24. See, e.g., Erving Goffman, On the Characteristics of Total Institutions, *in* Asylums: Essays on the Social Situation of Mental Patients and Other Inmates 1, 7 (Routledge 2017) (1961). Dr. Erving Goffman, a psychiatrist and prominent thinker, wrote about the characteristics common to a wide range of "total institutions" like psychiatric hospitals and prisons. See id. at 4–7. Chief among these characteristics was a lack of privacy, as "each phase of the member's daily activity [was] carried on in the immediate company of a large batch of others, all of whom [were] treated alike and required to do the same thing together." Id. at 6. Goffman noted that surveillance was a critical part of policing these spaces. Inmates were subjected to "a seeing to it that everyone does what he has been clearly told is required of him, under conditions where one person's infraction is likely to stand out in relief against the visible, constantly examined compliance of the others." Id. at 7.

25. See Wolf Wolfensberger, The Principle of Normalization in Human Services 28 (1972). See generally id. at 27. Psychiatrist Dr. Wolf Wolfensberger promoted the principle of normalization—a Scandinavian concept that referred to making available to people with intellectual and developmental disabilities "patterns and conditions of everyday life which

This Essay's contribution is twofold. It first tracks the historical development of surveillance mechanisms over time, highlighting the carceral logic underpinning those practices. It then uncovers the tension between the integration mandate and modern surveillance policies that have the potential to isolate and segregate. Specifically, this Essay analyzes three modern examples of surveillance. First, it considers state laws that permit the installation of sophisticated surveillance technology in group homes for people with disabilities.[26] Second, it considers surveillance mechanisms adopted by states under federal laws such as the 21st Century Cures Act, a federal law requiring all states to implement Electronic Visit Verification (EVV) systems to screen for Medicaid fraud.[27] Finally, it considers state laws and regulations that mandate surveillance of students with disabilities through threat-assessment processes as part of a proactive school-shooting-prevention strategy.[28]

A careful look at these modern surveillance policies and the reasons underpinning them demonstrates how the use of surveillance continues to promote and reproduce the same carceral logic that once drove the historical warehousing of people with disabilities. Surveillance can be deployed in service of *carceral ableism*—"the praxis and belief that people with disabilities need special or extra protections, in ways that often expand and legitimate their further marginalization and incarceration."[29] Legislation that permits, and in some circumstances requires, the

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are as close as possible to the norms and patterns of the mainstream of society." Id. at 27 (internal quotation marks omitted) (quoting Bengt Nirje, The Normalization Principle and Its Human Management Implications, *in* Changing Patterns in Residential Services for the Mentally Retarded 179, 181 (Robert B. Kugel & Wolf Wolfensberger eds., 1969)). A critical part of normalization was protecting the ability of people with disabilities to take risks: "We do 'say something' to the person who lives in the building that we build for them. We can say: 'We will protect you and comfort you—and watch you like a hawk!' Or we can say: 'You are a human being and so you have a right to live as other humans live, even to the point where we will not take all dangers of human life from you.'" Id. at 199.

26. See, e.g., Ariz. Rev. Stat. Ann. § 36-568 (2022).

27. See 21st Century Cures Act, Pub. L. No. 114-255, sec. 12006, 130 Stat. 1033, 1275 (2016) (codified as amended at 42 U.S.C. § 1396b(l) (2018)) (noting that Electronic Visit Verification (EVV) systems gather detailed information about Medicaid-funded personal care services).

28. See, e.g., Marjory Stoneman Douglas High School Public Safety Act, ch. 2018-3, § 2, 2018 Fla. Laws 6, 10. This Act requires each district, school board, and charter school governing board to establish a threat-management team responsible for assessing and intervening when someone's behavior "poses a threat of violence or physical harm." Fla. Stat. Ann. § 1006.07(7)(b), (e) (West 2023). Once threatening behavior is identified, threat-assessment teams have broad powers to share this information with law enforcement and other government agencies. Id. § 1006.07(7)(e), (g)–(h) (requiring the sharing of records or information with "other agencies involved with the student and any known service providers to share information and coordinate any necessary followup actions").

29. Ben-Moshe, Decarcerating Disability, supra note 12, at 17; see also Wolfensberger, supra note 25, at 18 (noting corollaries of this belief, including the "need for extraordinary control, restriction, or supervision" and "denial of citizenship rights and privileges").

installation of cameras in the homes of people with disabilities is an example of an ostensibly protective measure that undermines and dehumanizes people with disabilities. Surveillance can also be deployed as a means of identifying and punishing the *disability con*—"the cultural anxiety that individuals fake disabilities to take advantage of rights, accommodations, or benefits."[30] EVV systems are the outgrowth of a carceral logic that is suspicious of recipients of public benefits; the systems monitor and punish people with disabilities and their home health aides out of suspicion that they are committing fraud. Finally, surveillance may be driven by *carceral humanism*—a term coined by activist and scholar James Kilgore to describe a discourse that repackages punishment as part of service provision and entrenches the role of law enforcement, sheriffs, and corrections officers as caring service providers.[31] Threat-assessment processes are an example of a surveillance structure that feeds a culture of punishment involving "heavy monitoring of a person's behavior"[32] coupled with a threat of exclusion and incarceration for exhibiting behavior deemed risky or problematic.[33]

The integration mandate provides a framework to expose and challenge the carceral logic at play within these systems. *Olmstead* jurisprudence increasingly reflects the recognition that the integration mandate is not merely about the location of services but about the right to self-determination, choice, and the ability to freely interact with other members of the community.[34] But surveillance can isolate and segregate,

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30. For a discussion of the "disability con," see Doron Dorfman, Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse, 53 Law & Soc'y Rev. 1051, 1053–56 (2019).

31. See James Kilgore, Repackaging Mass Incarceration, Counterpunch (June 6, 2014), https://www.counterpunch.org/2014/06/06/repackaging-mass-incarceration/ [https://perma.cc/JC2M-XH95].

32. Id.; see also Broward Cnty., Fla., Sch. Bd. Policy 2130, Threat Assessment Policy 3 (2019), http://www.broward.k12.fl.us/sbbcpolicies/docs/Threat%20Assessment%20Policy.pdf [https://perma.cc/9S6W-VY84] (requiring threat-assessment teams to plan, implement, and monitor appropriate interventions aimed at "manag[ing] or mitigat[ing] a student's risk for engaging in violence" that would remain in place until they find that "the student is no longer in need of support" nor "pose[s] a threat to self or others").

33. See, e.g., Ike Swetlitz, Who's the Threat?, Searchlight N.M. (Oct. 15, 2019), https://searchlightnm.org/whos-the-threat/ [https://perma.cc/KG2L-DK9T] (outlining the experience of Jamari Nelson, a seven-year-old student with a disability in New Mexico who was expelled from school after being labeled a "high-level threat").

34. Federal courts have repeatedly found that plaintiffs receiving community-based services may still be at risk of segregation or isolation when services are administered in a manner that restricts access to the community. See, e.g., Steimel v. Wernert, 823 F.3d 902, 910 (7th Cir. 2016) (noting that plaintiffs argued that the state policies "impermissibly rendered the plaintiffs institutionalized in their own homes, and . . . put them at serious risk of institutionalization"); Fisher v. Okla. Health Care Auth., 335 F.3d 1175, 1184 (10th Cir. 2003) (finding that the integration mandate applied when the state restricted plaintiffs' choice of services, undermining their ability to remain in the community); Lane v. Kitzhaber, 841 F. Supp. 2d 1199, 1205 (D. Or. 2012) (finding that segregation in an

undermining this goal of integration.[35] Overprotective surveillance policies in group homes adversely impact people's ability to enjoy privacy and autonomy in their homes.[36] Surveillance used to police and prevent Medicaid fraud prevents recipients from freely accessing the community for fear of triggering a fraud alert and losing essential services.[37] Finally, surveillance policies that target people with disabilities based on ableist notions of dangerousness can result in their exclusion from school settings and their incarceration in prisons or hospitals.[38]

To avoid these outcomes, one must ask critical questions about whether surveillance systems will actually solve the problems that drive their use, how surveillance may be experienced by people subject to it, and whether the motivations behind these policies are rooted in prejudice. Failing to ask these questions before deploying these systems in community-based settings can result in superficial, rather than meaningful, integration within the community.[39] Conversely, asking these questions will allow policymakers to think more critically about surveillance systems

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employment setting violated the integration mandate because plaintiffs could not interact with people without disabilities while in that setting).

35. Torin Monahan, Regulating Belonging: Surveillance, Inequality, and the Cultural Production of Abjection, 10 J. Cultural Econ. 191, 192 (2017) (noting that surveillance works as a tool of regulation but also marks those subject to it as "dangerous or socially illegible").

36. See, e.g., Natalie Chin, Group Homes as Sex Police and the Role of the *Olmstead* Integration Mandate, 42 N.Y.U. Rev. L. & Soc. Change 379, 382 (2018) (making the argument that the failure by group homes to support the choices of residents with I/DD to exercise sexual rights could constitute a violation of the integration mandate); Leslie Salzman, Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans With Disabilities Act, 81 U. Colo. L. Rev. 157, 161 (2010) (arguing that guardianship could segregate and isolate people with disabilities in a manner that violates the integration mandate).

37. See Alexandra Mateescu, Data & Soc'y, Electronic Visit Verification: The Weight of Surveillance and the Fracturing of Care 8 (2021), https://datasociety.net/wp-content/uploads/2021/11/EVV_REPORT_11162021.pdf [https://perma.cc/FW8A-XABX] (noting that due to a lack of federal policy guidance, "[s]tate-level policies and technology design encoded far more invasive features into EVV systems than were required").

38. See, e.g., United States v. Georgia, 461 F. Supp. 3d 1315, 1323–25 (N.D. Ga. 2020) (finding that plaintiffs had stated an *Olmstead* claim when students with disabilities were removed from general education and placed in a separate program for students with "behavioral" issues).

39. See Liat Ben-Moshe, The Contested Meaning of "Community" in Discourses of Deinstitutionalization and Community Living in the Field of Developmental Disability, *in* Disability and Community 241, 260 (Allison C. Carey & Richard K. Scotch eds., 2011) [hereinafter Ben-Moshe, Contested Meaning] (noting that "mere[ly] clos[ing] . . . large state institutions . . . d[id] not necessarily entail a radical change in the discursive formations of developmental disability and the lived experiences of those so labeled," resulting in mini-institutions that are now located in the community); id. at 251 (observing that "physical integration [of services] is only the first step to integration" and that to achieve full inclusion, people with disabilities require "associations and friendships" that "encourage community membership" among disabled people).

and how they fray community bonds, feed negative stereotypes, and segregate and isolate people with disabilities.

To that end, this Essay proceeds in five parts. Part I outlines how surveillance is intertwined with the history of incarceration of people with disabilities. Part II outlines the ADA's clear remedial mission and the integration mandate's potential to disrupt carceral systems. Part III unpacks the arguments frequently made to justify surveillance of people with disabilities and uncovers the ableism underpinning those surveillance systems. Section III.A demonstrates how group home surveillance creates settings within the community that look like the institutions of the past, within which residents were deprived of privacy, self-determination, and autonomy. Similarly, section III.B uncovers how surveillance that looks like an innocuous bureaucratic tool for recording how services are provided in the community legitimizes old and unwarranted fears about the disability con while degrading the quality of those services and risking the reinstitutionalization of people currently receiving them. Section III.C describes how surveillance of students with disabilities to prevent dangerous behavior in schools makes it easier to remove them from integrated settings and place them in psychiatric hospitals or in jail. Part IV applies the integration mandate to these systems to demonstrate how the mandate can be used to disrupt and dismantle these surveillance systems, functioning as a tool of resistance. This Essay concludes with questions that must be asked before society turns to surveillance as a response to disability.

I. SURVEILLANCE AND DISABILITY

This Part argues that surveillance has played a critical role in the history of the management of people with disabilities. It begins by exploring the discriminatory potential of surveillance as a mechanism that is used to "sort[]" people into categories of risk and worthiness.[40] It then considers how surveillance was historically used to separate people with disabilities; remove them from public spaces; and funnel them into prisons, asylums, and residential schools. It tracks how the rationale for this surveillance has changed over the centuries: from managing the poor and ensuring that they were deserving of public aid, to policing the criminality associated with disability, to treating and rehabilitating disability. It concludes that the surveillance of people with disabilities has not relented even as public policies have shifted away from institutionalization and toward integration.

40. David Lyon, Introduction to Surveillance as Social Sorting: Privacy, Risk, and Digital Discrimination 1, 1 (David Lyon ed., 2003) ("[S]urveillance today sorts people into categories assigning worth or risk, in ways that have real effects on their life-chances. Deep discrimination occurs, thus making surveillance not merely a matter of personal privacy but of social justice.").

Rather, prejudicial ideas about disability continue to drive modern surveillance policies and practices.

A. *The Discriminatory Potential of Surveillance*

"Biopower," a term of Foucauldian provenance, refers to how authorities "rationalise the problems that the phenomena characteristic of a group of living human beings, when constituted as a population, pose to governmental practice," such as health, sanitation, and longevity.[41] Surveillance scholar Ayse Ceyhan points out that to regulate behavior, governments need to know their populations' present and likely future behavior.[42] Accordingly, government agencies have developed "a whole series of systems of knowledge focusing on the identification, the tracking and the surveillance of individuals considered as dangerous for the population's health . . . and well-being."[43] Government systems orient populations around a constructed idea of "normalcy"[44] whereby differences between populations are "materialised and made perceptible as pathology, while the subjects who come to bear them are rendered as defective, are disabled, and [are] signified as less than fully human."[45] The categorization of people as "mad or sane, sick or healthy, criminal or good" exemplifies the exercise of biopower.[46]

Biopower is concerned with protecting the population from bodies that are deemed risky or dangerous.[47] This perception of risk, however, is tied to discriminatory ideas about race, class, gender, sexuality, and

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41. See Shelley Tremain, The Biopolitics of Bioethics and Disability, 5 Bioethical Inquiry 101, 101 (2008) [hereinafter Tremain, Biopolitics] (citing 1 Michel Foucault, The History of Sexuality 143 (Robert Hurley trans., 1978)).

42. Ayse Ceyhan, Surveillance as Biopower, *in* Routledge Handbook of Surveillance Studies 38, 41 (Kirstie Ball, Kevin D. Haggerty & David Lyon eds., 2012).

43. Id.

44. See Lennard J. Davis, Enforcing Normalcy 24–29 (1995) (discussing the construction of the concept of "normalcy," tracing its roots as a statistical science, and tracking the reification of the norm as an ideal); Tremain, Biopolitics, supra note 41, at 102 ("[B]iopower has facilitated the emergence of regulatory mechanisms whose function is to provide forecasts, statistical estimates, and overall measures[,] . . . [which] have brought into being guidelines and recommendations that prescribe norms, adjust differentials to an equilibrium, maintain an average, and compensate for variations within the 'general population' . . . ."); see also Torin Monahan & Rodolfo D. Torres, Introduction to Schools Under Surveillance: Cultures of Control in Public Education 1, 7 (Torin Monahan & Rodolfo D. Torres eds., 2010) (noting that biopower operates by "regulariz[ing]" the population).

45. Tremain, Biopolitics, supra note 41, at 102.

46. Shelley Tremain, On the Government of Disability, 27 Soc. Theory & Prac. 617, 619 (2001).

47. Ceyhan, supra note 42, at 41–42 (arguing that biopower is driven by ideas of risk and security, resulting in a reliance on "risk-based surveillance approaches and solutions").

ability.[48] Surveillance scholarship has explored how surveillance acts as a sorting mechanism, defining who is in and who is out.[49] The implications of being sorted in this manner are severe and adverse for marginalized communities: Information gathered through surveillance can be used to exclude people from accessing rights, experiences, and processes.[50]

A rich body of scholarship has considered how communities of color are subjected to heightened surveillance that leads to marginalization and incarceration. Surveillance and Black Studies scholar Simone Browne has written evocatively and extensively about how surveillance techniques are used to create and maintain boundaries along racial lines, a process that she refers to as "racializing surveillance."[51] Historically, slave passes, runaway notices, and laws requiring that enslaved people carry lit candles as they moved about New York City after dark are all examples of othering practices that structured social relations in a way that privileged whiteness.[52] The legacy of this racialized surveillance persists. Professor Anita Allen has coined the term "Black Opticon" to describe the discriminatory oversurveillance of African Americans in online spaces, including tracking by police using facial recognition software.[53]

Scholars have also written extensively about how poor people are oversurveilled. Poor pregnant women seeking Medicaid-funded prenatal services are subjected to the rigorous and unrelenting eye of the state.[54]

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48. See, e.g., Monahan, supra note 35, at 192–93 (noting that surveillance contributes to "gendered, racialized, and classed violence" and that "cultural narratives (e.g.[,] about dangerousness or unworthiness) are often key drivers for the adoption of surveillance systems that in turn reify those discriminatory categories and subject positions").

49. Id. at 192.

50. See David Lyon, Kevin D. Haggerty & Kirstie Ball, Introducing Surveillance Studies, *in* Routledge Handbook of Surveillance Studies, supra note 42, at 1, 3 ("[S]urveillance of more powerful groups is often used to further their privileged access to resources, while for more marginalized groups surveillance can reinforce and exacerbate existing inequalities.").

51. See Browne, supra note 15, at 50–55. These techniques included keeping records and creating rules about the management of enslaved people on plantations. Id. at 51–52. They also included the outsourcing of surveillance to the white public. Through newspaper advertisements and "wanted" posters, white citizens were conscripted into watching and regulating Black bodies. See id. at 53–55. Another technique was the use of slave passes to manage the mobility of enslaved people. Id. at 52–53. In other cases, surveillance was branded onto enslaved peoples' skin—a form of biometric identification used to track their movements. See id. at 42.

52. See id. at 50–55, 78–80.

53. Anita L. Allen, Dismantling the "Black Opticon": Privacy, Race Equity, and Online Data-Protection Reform, 131 Yale L.J. Forum 907, 910 (2022), https://www.yalelawjournal.org/pdf/F7.AllenFinalDraftWEB_6f26iyu6.pdf [https://perma.cc/3FVL-RUH9].

54. See Khiara M. Bridges, The Poverty of Privacy Rights 5 (2017) (explaining that the intrusive questioning poor pregnant women experience when seeking to access Medicaid programs in New York and California demonstrates that "[t]o be poor is to be subject to invasions of privacy that we might understand as demonstrations of the danger of government power without limit").

Professor Khiara M. Bridges argues that to access these services, poor women are forced to answer intrusive questions about their relationships, finances, and health, suffering violations of their privacy that wealthy women do not.[55] Similarly, scholar Scott Skinner-Thompson describes how people living on the streets are subject to constant surveillance because of their unhoused status, both by police—who may forcibly remove them from public land—and "by social gaze and feelings of shame and disenfranchisement."[56] John Gilliom's scholarship on welfare surveillance demonstrates that surveillance is a key part of identifying, controlling, and managing poor people seeking state support.[57]

Surveillance practices are also influenced by ableist ideas about disability.[58] "Ableism" refers to beliefs that reinforce the subordination of people with disabilities.[59] As Professor Michelle Nario-Redmond explains, "[t]he term ableism emerged out of the disability rights movements within the United States and Britain to serve as an analytic parallel to sexism and racism for those studying disability as social creation."[60] "Ableism" refers to the complex web of political, cultural, economic, and social practices that subordinate people with disabilities.[61] It manifests in "labeling—or pathologizing—bodies and minds as deviant, abnormal, incapable, incompetent, dependent, or impaired" and therefore undesirable and unproductive.[62] It may also seem benevolently "inspired by charitable intentions that nevertheless allow for the justification of control, restricted rights, and dehumanizing actions."[63]

People with disabilities may be *disparately impacted* by surveillance practices in various contexts, from education to employment to the

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55. See id. at 8.

56. Scott Skinner-Thompson, Privacy at the Margins 17, 19 (2020).

57. See John Gilliom, Overseers of the Poor: Surveillance, Resistance, and the Limits of Privacy 2–3 (2001) ("The politics of surveillance necessarily include the dynamics of power and domination.").

58. Natasha Saltes, 'Abnormal' Bodies on the Borders of Inclusion: Biopolitics and the Paradox of Disability Surveillance, 11 Surveillance & Soc'y 55, 56 (2013) ("When disability surveillance is carried out in ways that pathologize and exclude people with impairments . . . to limit access to resources and/or citizenship, disability tends to be defined in terms of a functional limitation and people with impairments are seen as those with non-normative bodies that pose a 'risk'.").

59. See, e.g., Talila A. Lewis, Working Definition of Ableism—January 2022 Update, Talila A. Lewis: Blog (Jan. 1, 2022), https://www.talilalewis.com/blog/working-definition-of-ableism-january-2022-update [https://perma.cc/6J6K-82LB].

60. Michelle R. Nario-Redmond, Ableism: The Causes and Consequences of Disability Prejudice 5 (2020).

61. Jamelia N. Morgan, Reflections on Representing Incarcerated People With Disabilities: Ableism in Prison Reform Litigation, 96 Denv. L. Rev. 973, 980 (2019).

62. See id. at 981.

63. Nario-Redmond, supra note 60, at 10.

criminal legal system.[64] For example, employers are increasingly relying on monitoring software to track employee productivity through surveillance technology that can punish workers with disabilities, who "often require opportunities for rest, flexibility, and supportive work environments to attend to disability-related needs."[65] This Essay's focus is on surveillance systems that directly target people with disabilities—particularly intellectual and developmental disabilities (I/DD) and psychiatric disabilities—and mark them as *requiring* surveillance. As expounded more fully in the following section, people with disabilities have historically experienced the state's heavy-handed and intrusive management in their lives and affairs. Surveillance mechanisms were critical to this mission of ensuring that the dangers posed by disability were, quite literally, isolated and contained.

B. *The Long History of Disability Surveillance*

1. *The Carceral Purposes of Early Surveillance Mechanisms.* — In colonial times, the need to manage disabled bodies was interwoven with the need to control and incarcerate populations that required governmental assistance, including the poor, widows, orphans, and the elderly.[66] Relief that was once "outdoor[s]" and provided to poor families in their homes was brought indoors into the poorhouses, where those accepting aid could be properly scrutinized, supervised, and ultimately deterred from seeking

64. For example, virtual proctoring systems have become increasingly popular in the wake of the COVID-19 pandemic as high schools and universities across the United States have employed these systems to replace in-person proctored exams. See Lydia X.Z. Brown, Ridhi Shetty, Matthew U. Scherer & Andrew Crawford, Ctr. for Democracy & Tech., Ableism and Disability Discrimination in New Surveillance Technologies 7–8 (2022), https://cdt.org/wp-content/uploads/2022/05/2022-05-23-CDT-Ableism-and-Disability-Discrimination-in-New-Surveillance-Technologies-report-final-redu.pdf [https://perma.cc/664Z-WCU3]. Students with disabilities are more likely to be "flagged as potentially suspicious" by this technology for engaging in disability-related behavior during an exam, like taking longer bathroom breaks or using dictation software. Id. at 8, 14 (noting that virtual proctoring systems adversely impact "students with disabilities, who already face disproportionately high rates of school discipline and surveillance"); see also Lydia X.Z. Brown, How Automated Test Proctoring Software Discriminates Against Disabled Students, Ctr. for Democracy & Tech. (Nov. 16, 2020), https://cdt.org/insights/how-automated-test-proctoring-software-discriminates-against-disabled-students/ [https://perma.cc/CY5J-CUJ2]; Drew Harwell, Mass School Closures in the Wake of the Coronavirus Are Driving a New Wave of Student Surveillance, Wash. Post (Apr. 1, 2020), https://www.washingtonpost.com/technology/2020/04/01/online-proctoring-college-exams-coronavirus/ (on file with the *Columbia Law Review*).

65. Brown et al., supra note 64, at 53.

66. See Rothman, supra note 13, at 4; see also Chapman et al., supra note 11, at 3–4 (noting that "[c]riminalization and class oppression" were "central to the earliest forms of confining disabled (and nondisabled) people" in almshouses and poorhouses, which housed the "poor, disabled, widowed, orphaned, and sick").

public assistance.[67] From 1824 on in New York, it was mandatory for each county to have a poorhouse—a move that wove the institution into the management of the needs of people with disabilities.[68] In agricultural states like Texas, poor farms housed and worked indigent people.[69]

These poorhouses were heavily regulated spaces with harsher living conditions than those occupied by the poorest of laborers.[70] A Massachusetts Legislative Committee report authored by Josiah Quincy recommended that these houses be "well regulated under the superintendent of the principal inhabitants of the vicinity; and be conducted systematically, with strictness and intelligence."[71] Indeed, "paupers" who resided in workhouses had to give up control of their personal lives and their rights as citizens.[72] Gilliom notes that the surveillance carried out in workhouses and poorhouses was a precursor to modern welfare surveillance.[73] Much like modern surveillance systems that gather information to assess whether poor people are really eligible for the aid they are receiving, workhouse surveillance was intended to sort and categorize people as being part of either the "impotent poor" or the "able poor."[74]

Surveillance tools were also used to demean the poor and discourage them from seeking state assistance. Engaging in "exhaustive investigations of poor families" was one such tactic.[75] The suspicion of the poor resulted in the development of another surveillance mechanism—that of the "friendly visitor."[76] The Charity Organization Society (COS), a New York–based charity organizer that played an important role in shaping state responses to poverty, had a mission to "coordinate, investigate, and

67. See, e.g., Rothman, supra note 13, at 166 ("[C]ommittees [in Massachusetts and New York] insisted that outdoor relief aggravated rather than relieved poverty by encouraging the poor to rely upon a public dole instead of their own energy."); see also Debbie Mauldin Cottrell, The County Poor Farm System in Texas, 93 Sw. Hist. Q. 169, 171 (1989) (describing Massachusetts and New York reports that claimed that indoor care would "frighten[]" people to work and "generally discourage[] applicants for assistance").

68. Act to Provide for the Establishment of County Poorhouses, ch. 331, 1824 N.Y. Laws 382; see also Trent, supra note 10, at 6 (tracing the move toward "indoor relief").

69. See Cottrell, supra note 67, at 170 (discussing poor farms in predominantly agricultural states like Texas).

70. See Ben-Moshe, Decarcerating Disability, supra note 12, at 41–42 (noting that the conditions in almshouses and poorhouses were deliberately inhumane and abusive to deter the "unworthy" poor).

71. Josiah Quincy, Report of the Committee on the Subject of Pauperism and a House of Industry in the Town of Boston 8 (1821).

72. See Cottrell, supra note 67, at 172.

73. See Gilliom, supra note 57, at 23–24.

74. See id. at 23.

75. See id.

76. See id. at 24.

counsel" rather than provide material relief.[77] The COS's main concern was to suppress idleness and beggary and relieve "worthy, self-respecting poverty."[78] That is, the COS was primarily concerned with detecting and preventing fraud.[79] It sent a "friendly visitor" to visit each poor family.[80] While ostensibly a kind and benevolent presence, the friendly visitor was also a way of collating information, "unmask[ing] impostures of poverty or disability."[81] COS organizers advocated "systematic record-keeping, surveys and research into every 'case.'"[82] As disability studies and history scholar Susan Schweik puts it: "These bureaucratic records might seem like individual microcosms or microaggressions, but they were of course far more than that; they connected the system of surveillance to broader mechanisms of disciplinary power and control."[83]

2. *Surveillance for the Purpose of Reform and Rehabilitation.* — In the early to mid-nineteenth century, a "cult of asylum" swept across America, resulting in the development of new surveillance practices aimed at rehabilitating disability.[84] As medical service providers insisted that mental illnesses could be cured, confinement in an asylum became the first stop in the treatment of disabled people.[85] Around this time, attitudes and behaviors focused on housing "the insane, disabled, and feeble minded," who were deemed to be festering away in workhouses.[86] Psychiatrists and medical superintendents argued that they could rehabilitate disability through properly organized institutions with rigorous reformatory curricula.[87] This resulted in the creation of schools that aimed to reform disabled individuals' character.[88] In 1847, Massachusetts set aside funding

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77. See Schweik, supra note 10, at 41 (internal quotation marks omitted) (quoting Michael B. Katz, In the Shadow of the Poorhouse: A Social History of Welfare in America 78 (1986)).

78. Id. (internal quotation marks omitted) (quoting Frank Dekker Watson, The Charity Organization Movement in the United States 188 (1922)).

79. See id. at 43 (noting that fraud detection was "a trademark COS enterprise in the public eye").

80. Id.

81. Id.

82. Id.

83. Id.

84. Appleman, supra note 16, at 428 (internal quotation marks omitted) (quoting Rothman, supra note 13, at 130).

85. See id. at 432 (noting that in 1842, New York's commitment statute required a minimum six-month detention in the new state asylum in Utica).

86. See id. at 433.

87. See Chapman et al., supra note 11, at 7 ("Within the walls of the institution or penitentiary, experts could create an environment that exemplified the principles of a well-ordered society and thereby (it was believed) cure inmates of insanity, deficiency, and deviancy.").

88. See Trent, supra note 10, at 8 (describing the development of these schools for people with intellectual disabilities as inspired by two famous institutions established in

for an "idiot" school.[89] Connecticut, Kentucky, Ohio, and Pennsylvania quickly followed.[90]

These schools and asylums were heavily regulated spaces. Their routines resembled those of the nation's prisons and penitentiaries and brought a "bell-ringing precision" into residents' lives.[91] This drive toward discipline was also echoed in the architecture of asylums that housed people with psychiatric disabilities: "Typically, a central structure of several stories stood in the middle of the asylum grounds, and from it radiated long and straight wings [where patients lived]."[92] This system permitted officials to watch over the patients. Social and medical historian David Rothman notes, "Each class of patients had its own particular obligations and privileges, and a hierarchy of officials watched their behavior, ready to move them from one category to another."[93] The asylums exercised strict control over whom the "inmates" interacted with: They were frequently removed from their families and not permitted any visitors or correspondence during the time they spent at the asylum.[94]

3. *Surveilling "Criminals" and "Degenerates".* — Between 1790 and 1830, the nation's population increased exponentially.[95] American legislators, newly independent and free from the shackles of British rule, developed new criminal codes that moved away from the British system of capital punishment and toward incarceration.[96] As concern about an increase in crime intensified, Americans devised new ways of rooting out and stopping deviant behavior.[97] Society turned to finding that deviancy in peoples' biology, personal histories, and experiences.[98] Surveillance during this

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Paris, Salpêtrière and Bicêtre, which were focused on treating the insane and educating those deemed "idiots").

89. See id.

90. See id. at 10.

91. See Rothman, supra note 13, at 153–54 (noting that the strict regimentation of the asylums "represented both an attempt to compensate for public disorder in a particular setting and to demonstrate the correct rules of social organization").

92. Id. at 153.

93. Id. at 154.

94. Id. at 151.

95. See id. at 57 ("In 1790, no American city had more than fifty thousand residents. By 1830, almost half a million people lived in urban centers larger than that.").

96. See id. at 60–61 (observing that by 1820, states had amended their criminal laws to abolish the death sentence except as punishment for first-degree murder or other very serious crimes). Rothman notes that American society shifted away from British laws that seemed to serve the passions of the few to laws concerned with the causes of deviant behavior. See id. at 60. Accordingly, "[m]en intently scrutinized the life history of the criminal and methodically arranged the institution to house him." Id. at 62.

97. Id. at 65.

98. Id.

time took on a moral dimension, playing a role in identifying aberrance and keeping it out of society.[99]

This use of surveillance had implications for people with disabilities.[100] Laws began to criminalize disability and disability-related behavior, sanctioning the increased scrutiny of disabled bodies, particularly in public spaces. Across the nation, cities like San Francisco, Chicago, and New Orleans passed "ugly laws" to remove people with disabilities from the streets.[101] These laws employed a variety of mechanisms to delegitimize disabled people's use of public spaces. Some were wrapped up in a language of care.[102] Others overtly criminalized activities that people with disabilities routinely engaged in—like public begging.[103]

Social policies that targeted the purported link between disability and criminality were bolstered by the eugenics movement.[104] In 1851, English philosopher Herbert Spencer argued that "nature's failures" included "those with mental, physical, or moral deficiencies."[105] Eugenicists believed that moral degeneracy and criminality were inherited.[106] In his book *The Kallikak Family*, Henry Goddard, of the Vineland School for Feeble-Minded Girls and Boys, emphasized the need to carefully study the minds of the "feebleminded" by analyzing the trajectories of two lines of descendants from the same man—one through "'a woman of his quality'"

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99. See id. at 69–70 (observing that the Jacksonians grappled with how to "eliminate crime and corruption" while also "doubt[ing] the society's survival, fearing it might succumb to chaos"). This fear made it critical to create social organizations to police the "problem" of deviance.

100. See Liat Ben-Moshe, Disabling Incarceration: Connecting Disability to Divergent Confinements in the USA, 39 Critical Socio. 385, 389 (2011) ("The history of treatment and categorization of those labeled as feebleminded, and later mentally retarded, is also paved with cobblestones of notions of social danger, as prominent eugenicists tried to 'scientifically' establish that those whom they characterized as feebleminded had a tendency to commit violent crimes.").

101. See Schweik, supra note 10, at 24–39 (describing the specific characteristics of laws enacted in each of these cities).

102. See id. at 64 (providing an example of Denver's "ugly ordinance," which "[spoke] the language of regulatory care," even as its law on "'[d]eformed persons—how cared for'" was "followed immediately by 'shall not expose himself to public view'").

103. See id. at 24 ("The San Francisco ordinance begins with a general order to 'Prohibit Street Begging' . . . .").

104. See Appleman, supra note 16, at 438 (explaining a popular nineteenth-century criminology theory that linked "the criminal mind" to physical features and defects through genetic inheritance, giving "eugenicists a scientific basis for attacking and controlling crime . . . through institutionalization, incarceration . . . , and sterilization").

105. Adam Cohen, Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck 45 (2016).

106. See id. at 51 ("[Eugenicists] created elaborate pedigrees showing how feeblemindedness, drunkenness, criminality, and moral degeneracy were inherited within families. In [their] view, Mendel's laws supported their belief that if the 'socially defective' were prevented from having children[,] . . . bad traits could be bred out, and good traits would proliferate.").

and another "through a 'feeble-minded girl.'"[107] Ultimately, Goddard decided that visits by trained workers to the children's families were required to study mental defectiveness in the families as a whole. Goddard came up with the categories of "idiots," "imbeciles," and "morons" to describe various levels of disability.[108]

Surveillance was deemed necessary to ensure that those classified as "imbeciles" or "feebleminded" did not marry or have children and thereby pass down their immorality and criminality. For example, eugenics laws prohibiting marriage imposed criminal penalties if people deemed to be epileptic or "imbecilic" married.[109] Many prominent lawmakers, however, did not believe this was sufficient because nothing prevented "defective" people from procreating without a marriage license.[110] Accordingly, they proposed identifying and institutionalizing them during their reproductive years.[111] People with disabilities were to be watched carefully and monitored to prevent procreation. As Goddard put it:

> Determine the fact of their defectiveness as early as possible, and place them in colonies under the care and management of intelligent people who understand the problem . . . . Train them, make them happy; make them as useful as possible, but above all, bring them up with good habits and keep them from ever marrying or becoming parents.[112]

The Eugenics Record Office, a research institute that became the center of the eugenics movement in America, was established in 1910.[113] Its focus was on the collection of eugenics information. Office trainees were taught to investigate communities, families, and individuals.[114] As journalist Adam Cohen notes, "[t]he trainees, who were overwhelmingly young women[,] . . . were deployed to mental hospitals, poorhouses, and

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107. See id. at 52–53 (quoting Henry Goddard, The Kallikak Family 50, 69 (1912)) ("The line from Kallikak's wife, Goddard found, included generations of doctors, judges, and other successful men. The line from the 'feeble-minded girl' was rife with prostitutes, criminals, and epileptics.").

108. See id. at 52 (internal quotation marks omitted) (quoting Henry Goddard, The Kallikak Family 11, 102, 104 (1912)).

109. See id. at 63 (internal quotation marks omitted) (quoting 1895 Conn. Pub. Acts 677) ("Connecticut, the first state to act, adopted an 1895 law barring 'epileptic, imbecile, or feeble-minded' individuals from marrying if the woman was under forty-five. The penalty was up to three years in prison . . . . [F]orty-one states would [follow] by the mid-1930s." (quoting 1895 Conn. Pub. Acts 677)).

110. See id.

111. See id. at 63–64 (noting that eugenicists like Goddard and Dr. Walter E. Fernald of Massachusetts "began to rally around a tactic" of segregation and colonization: "identify[ing] the feebleminded and other people who should not have children[] and plac[ing] them in state institutions during their reproductive years").

112. Id. at 64 (internal quotation marks omitted) (quoting Henry H. Goddard, Sterilization and Segregation 4 (1913)).

113. Id. at 114–15.

114. Id. at 115.

other institutions across the country," including "Ellis Island, where they were instructed on how to identify feebleminded people trying to enter the country."[115] The office then used this carefully gathered data in trait-heritability studies and projects tracking certain qualities, like criminality, through family generations.[116] The Eugenics Record Office also provided individualized data to couples "considering marrying but uncertain of the eugenic implications."[117] By the 1920s, this office began influencing the U.S. government, beginning with proposals for forced sterilization laws, which became the impetus for immigration laws that limited the number and characteristics of immigrants in the 1920s and beyond.[118] Poor people with disabilities, particularly "feebleminded" women, were subject to near-constant surveillance as law and medicine colluded to confine them in facilities where they could be sterilized.[119]

The "science" of eugenics began to lose favor only in the 1960s, when popular attitudes toward the treatment of marginalized groups began to change.[120] Up until that time, however, the institutionalization of people with disabilities continued in full force. In the 1940s and 1950s, many physicians recommended institutionalization as a way to provide specialized care to people with significant needs.[121] Middle-class people saw the institutionalization of children with disabilities as necessary for the well-being of the family.[122] The prevailing belief was that people with intellectual disabilities were perpetual children, requiring oversight in therapeutic, institutionalized settings.[123]

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115. Id.

116. See id. at 115–16.

117. Id. at 116.

118. See id. at 116–35 (describing how Harry Laughlin ascended in rank within the Eugenics Record Office, proposed several sterilization laws, and turned to immigration law as the solution for eradicating "defective" people—a decision that ultimately resulted in the passage of the Immigration Act of 1924).

119. See id. at 22–23. The experience of Emma Buck illustrates this point. Emma was the mother of Carrie Buck, the woman at the heart of the notorious Supreme Court decision in *Buck v. Bell*. In that case, the Court ruled that Virginia's statute mandating involuntary sexual sterilization of people with disabilities did not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Buck v. Bell, 274 U.S. 200, 207 (1927). Emma Buck was arrested on the grounds of prostitution—a vague charge that was applied to a wide range of conduct, including vagrancy. Cohen, supra note 105, at 22. Judge Charles D. Shackelford, of the Charlottesville, Virginia, domestic relations court, adjudged Emma as being feebleminded, and she was committed to the Colony for Epileptics and Feeble-Minded. Id. She was given an intelligence test when she arrived and was diagnosed as being a "Moron." Id. at 23. She would remain incarcerated for the rest of her life. Id.

120. See Cohen, supra note 105, at 319 (noting that from 1965 to 1979, at least fifteen states repealed laws permitting involuntary sterilization).

121. See Trent, supra note 10, at 228.

122. See id. at 229.

123. See id.; see also Ben-Moshe, Decarcerating Disability, supra note 12, at 193–94 (noting that parents opposing the closure of institutions would "often raise questions like 'what will happen to my child?' even though the child in question is often someone in his

4. *Surveillance in the Age of Integration.* — By the 1960s, cracks were beginning to appear in the logic of institutionalization. Thomas Szasz's book *The Myth of Mental Illness* was published in 1961, casting doubt on psychiatry as a profession and condemning its role in subjecting people diagnosed with mental illness to coercive state practices.[124] Psychologists like Wolf Wolfensberger promoted the notion of "normalization"—the idea that people with intellectual disabilities should and could live in the community as valuable members of society.[125] Media exposés demonstrated the horror of living in asylums and centers for the intellectually and developmentally disabled.[126] In 1961, John F. Kennedy formed the President's Panel on Mental Retardation, which advocated for additional supports and services within the community for those diagnosed with intellectual disabilities.[127] At the same time, federal Medicaid funding became available to move people out of institutions.[128] Financial factors, including the expense of upgrading run-down facilities, also prompted the end of institutionalization.[129] Further, as institutionalization became less popular, institutions "lost one of their major labor forces: the institutionalized."[130]

While the deinstitutionalization movement was very successful in depopulating large institutions, it was less effective in changing social

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or her fifties or older," evoking "tropes of some disabled people as innocent and eternal children").

124. See Thomas S. Szasz, The Myth of Mental Illness 296 (1961) (arguing that the definition of psychiatry "as a medical specialty concerned with . . . mental illness" is "worthless and misleading" because "[m]ental illness is a myth" and "[p]sychiatrists are not concerned with mental illnesses and their treatments").

125. See Wolfensberger, supra note 25, at 27–28.

126. Ben-Moshe, Decarcerating Disability, supra note 12, at 46–53 (detailing the numerous exposés that played a role in changing public perceptions toward institutionalization, including Geraldo Rivera's exposé of Willowbrook, an institution on Staten Island that housed thousands of people with various disabilities).

127. See David L. Bazelon & Elizabeth M. Boggs, The President's Panel on Mental Retardation: Report of the Task Force on Law 30 (1963), https://mn.gov/mnddc/parallels2/pdf/60s/63/63-ROT-PPMR.pdf [https://perma.cc/6HZT-FQU8] ("To *the* maximum feasible extent, the status of the [institutionalized] mentally retarded patient should be reviewed by the institutional authorities and his ability to return to society reassessed by them on a periodic basis.").

128. Trent, supra note 10, at 249 ("By 1976, most states were using Medicaid funding to plan for the deinstitutionalization of incarcerated retarded adults."). In 1981, Congress added section 1915(c) to the Social Security Act, giving states the option to develop home- and community-based services to provide supports and services to people with disabilities within the community, rather than in institutions. See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, secs. 2175–2176, 95 Stat. 357, 809–13 (codified as amended at 42 U.S.C. § 1396n (2018)).

129. See Ben-Moshe, Decarcerating Disability, supra note 12, at 57.

130. Id. at 59.

prejudices against people with disabilities.[131] In 1967, close to 200,000 people lived in large public institutions.[132] By 2012, that number had dropped to 22,099 residents.[133] As institutions were downsized, however, community-based residential settings never wholly abandoned the strictures of the institution, including the need to oversee and control group home residents.[134] Wolfensberger emphasized that "both positive imagery and competency-enhancing measures . . . can diminish the negativity of a negative role perception."[135] Group home service providers subverted the meaning of normalization as they translated it into policy by developing a range of disciplinary techniques, including "cultivating bodily regimens in relation to hygiene, conduct, sexuality, and so on in order to resemble peer like behavior."[136] Consequently, this meant deploying "different techniques of surveillance of the resident and their actions and the constant monitoring and recording of their compliance."[137]

Deinstitutionalization also did not erase perceptions of people with disabilities as "risky" or dangerous. Deinstitutionalizing asylums and psychiatric hospitals came about after growing social critiques of conditions within these facilities as well as a growing concern about psychiatry as an "agent of social control."[138] By the end of the 1970s, all states had restrictions on civil commitment based on whether one posed a danger to oneself or to others.[139] Ironically, this framing of psychiatric disability reinforced a public and legal discourse linking mental illness with dangerousness and criminality.[140] This association gave rise to new forms of surveillance and control.[141] Professor Liat Ben-Moshe notes that the courts were tasked with deciding who could be hospitalized, which "embedded psy powers in the law."[142] The focus shifted from "involuntary hospitalization based on psych diagnosis to one based on psychiatrists' and

131. See Ben-Moshe, Contested Meaning, supra note 39, at 243 ("[T]he shift from custodial care and institutionalization to deinstitutionalization and community living should not be . . . seen as the rise and fall of one epoch to be replaced by the other . . . because the effects of the former still linger on in the latter.").

132. See Trent, supra note 10, at 266.

133. See id.

134. See Ben-Moshe, Decarcerating Disability, supra note 12, at 108 (noting the reach of the therapeutic state's control over those who live in group homes and other institutions).

135. See Wolf Wolfensberger, A Brief Introduction to Social Role Valorization: High-Order Concept for Addressing the Plight of Societally Devalued People, and for Structuring Human Services 94 (3d ed. 1998). Wolfensberger further explains that these principles of positive imagery and competency enhancement "are equally applicable to . . . decisions . . . *outside* of formal, organized human services." Id. at 1.

136. Ben-Moshe, Decarcerating Disability, supra note 12, at 77.

137. Id.

138. Id. at 88.

139. Id. at 99–100.

140. Id. at 100.

141. Id. at 108.

142. See id. at 99.

courts' opinions of dangerousness, which was racial[ized], gendered, and intertwined with sexuality."[143] As a result, "psychiatric coercion[] lay everywhere"—although they were no longer institutionalized, people with psychiatric disabilities were "still under the surveillance of the therapeutic State."[144]

There continues to be an appetite to surveil those deemed disabled. While a growing movement of advocates has sought to claim disability as an affirmative and positive identity,[145] public discourse has tended to treat disability identity as lacking and resource-intensive. Jasmine Harris, Elizabeth Emens, and Doron Dorfman have pointed out how a cost narrative continues to permeate public discourse around disability, such that expenditures on accommodations and public benefits continue to be viewed with suspicion.[146] Scholars like Jamelia Morgan have written extensively about how disability-related behaviors continue to be managed through the criminalization of those behaviors.[147] Current statistics are sobering: As of a 2015 DOJ report documenting national disability rates among incarcerated people from 2011 to 2012, around 32% of people incarcerated in prisons and 40% of those in jails have at least one disability; 20% of prisoners and 31% of jail inmates report having a cognitive disability.[148]

This has led disability advocates and scholars to ask the difficult question whether true community integration has really been achieved. Ben-Moshe proposes two visions of community integration.[149] One idea is that of community as negation—the presumption that the work is done

143. Id. at 100.

144. Id. at 108.

145. See, e.g., Katie Eyer, Claiming Disability, 101 B.U. L. Rev. 547, 553 (2021) (calling for people to embrace disability identity as a way to disrupt disability stigma).

146. Dorfman, supra note 30, at 1054 ("[W]ho would not want to park closer to the entrance, take the dog to venues that usually prohibit pets, receive more time on exams, or skip the lines . . . ? Those 'small disability perks' can . . . [be] behind people's suspicions that others fake disabilities to enjoy . . . perks or 'special rights.'"); Elizabeth F. Emens, Kaaryn S. Gustafson & Jasmine E. Harris, The Disability Cost Narrative: A Roundtable Discussion, 170 U. Pa. L. Rev. 1951, 1951, 1957 (2022) (arguing that the question of cost permeates disability rights discussions).

147. See Jamelia Morgan, Disability's Fourth Amendment, 122 Colum. L. Rev. 489, 510 (2022) ("Disability policing reinforces stereotypes that associate disability with criminality, specifically those that construct disabled people as suspicious, deviant, risky, dangerous, or threatening."); Jamelia N. Morgan, Rethinking Disorderly Conduct, 109 Calif. L. Rev. 1637, 1642 (2021) (arguing that disorderly conduct laws enforce discriminatory norms that deny people with disabilities access to public spaces and criminalize disability-related "non-conforming" behavior).

148. Jennifer Bronson, Laura M. Maruschak & Marcus Berzofsky, DOJ, NCJ 249151, Disabilities Among Prison and Jail Inmates, 2011–12, at 3 (2015), https://bjs.ojp.gov/content/pub/pdf/dpji1112.pdf [https://perma.cc/3EH6-PKNC] (reporting that cognitive disabilities are four times more prevalent in persons incarcerated in prison and six-and-a-half times more prevalent among persons incarcerated in jails).

149. See Ben-Moshe, Contested Meaning, supra note 39, at 244–52.

once services are provided outside the walls of the institution.[150] "Community," here, simply means "that which is not the institution."[151] The richer and more nuanced idea of community integration emphasizes the importance of ensuring that people with disabilities develop meaningful relationships within the community and retain autonomy and control over their lives.[152] The concept of "community-based services" is about not just the location of services but also "an epistemic shift in regard to the hierarchical system of care."[153]

As the next Part of this Essay demonstrates, the integration mandate—as codified in Section 504 of the Rehabilitation Act and in the ADA and interpreted by the Supreme Court in *Olmstead*—embraces the latter vision of community.[154] Accordingly, it is necessary and appropriate to ask critical questions about the utility of policies that promote surveillance, with its potential to isolate based on perceptions of risk, and those policies' impact on the goal of community integration of people with disabilities. The integration mandate provides a legal framework to challenge surveillance policies that isolate people with disabilities or threaten them with institutionalization.

II. SURVEILLANCE AND THE INTEGRATION MANDATE

Part II has three goals. First, it outlines the codification of integration in Section 504 of the Rehabilitation Act and in the ADA as a key prescriptive remedy for discrimination. Second, it examines the Supreme Court's holding in *Olmstead v. L.C. ex rel. Zimring* that the unjustified isolation of people with disabilities constitutes a violation of the integration mandate—a decision that was enthusiastically embraced by the executive and judicial branches. Finally, Part II demonstrates how *Olmstead* jurisprudence now recognizes that people with disabilities can be isolated and segregated even when they are outside the walls of an institution and residing in the community.[155] *Olmstead* jurisprudence adopts a vision of community that is expansive and geared toward protecting the autonomy, privacy, and self-determination of people with disabilities.[156] This has been bolstered by guidance issued by the Department of Justice on the scope of the integration mandate.[157] The integration mandate thus provides a

150. See id. at 244, 249.

151. Id. at 244.

152. Id. at 249–51 ("Community seems more about support and acceptance, and therefore about personal and interpersonal characteristics, rather than size or place.").

153. Id. at 257.

154. See infra section II.B.

155. See infra section II.B.

156. See infra section II.C.

157. See infra section II.C.

means to interrogate the use of ableist surveillance practices that threaten to isolate or segregate people with disabilities within the community.

A. *Legislative Measures Mandating Integration*

The integration mandate was first codified in Section 504 of the Rehabilitation Act of 1973—the precursor to the ADA.[158] It provides that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[159] In 1976, President Gerald R. Ford issued an executive order instructing the Department of Health, Education, and Welfare (HEW) to issue regulations implementing Section 504 that clarified whom the law protected and what discriminatory acts it prohibited.[160] In 1978, HEW issued Section 504 regulations that required recipients of federal funds to "administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons."[161] The preamble to these regulations provided that "separate" treatment of people with disabilities was justified only "where necessary to ensure equal opportunity and truly effective benefits and services."[162] Section 504 makes clear that federal agencies and recipients of federal funding have to make reasonable modifications to their policies to avoid discrimination and promote integration.[163]

While Section 504 applied to entities that received federal funding, people with disabilities continued to face isolation and segregation, even within the community. Senator Paul Simon commented that despite the enactment of laws like the Rehabilitation Act, a "sizable part of our population remain[ed] substantially hidden . . . in institutions[,] . . . in nursing homes[,] . . . [and] in the homes of their families."[164] In 1988, Congress introduced federal legislation that formed the foundation of the ADA.[165] The ADA is founded on Congress's explicit recognition that

158. The text of the ADA provides that it is based on the "remedies, procedures, and rights" of Section 504. See 42 U.S.C. § 12133 (2018) ("The remedies, procedures, and rights set forth in section [504 of the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.").

159. 29 U.S.C. § 794(a) (2018).

160. Exec. Order No. 11,914, 3 C.F.R. § 117 (1977).

161. Implementation of Executive Order 11,914, Nondiscrimination on the Basis of Handicap in Federally Assisted Programs, 43 Fed. Reg. 2132, 2138 (Jan. 13, 1978) (codified at 45 C.F.R. § 85.21(d)).

162. Id. at 2134.

163. 29 U.S.C. § 794(a).

164. 134 Cong. Rec. 9384 (1988) (statement of Sen. Simon).

165. H.R. 4498, 100th Cong. (1988); S. 2345, 100th Cong. (1988).

people with disabilities have historically been isolated and segregated and that this continued to be "a serious and pervasive social problem" at the time of enactment.[166] Accordingly, the ADA was clear that "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[167] In so stating, the ADA extended to state entities the obligation to prevent discrimination against people with disabilities.[168]

When it was passed, the ADA was perceived to be groundbreaking legislation, unusual in the clarity of its "remedial mission" to shift social norms and integrate people with disabilities into society.[169] Congressional debates demonstrate the clear link made between segregation and discrimination: "To be segregated is to be misunderstood, even feared. . . . [O]nly by breaking down barriers between people can we dispel the negative attitudes and myths that are the main currency of oppression."[170] This framing clarifies that the purpose behind integration was more profound than simply changing the location of services from institutions to the community—it required the removal of *all* barriers that prevented people with disabilities from truly becoming part of the community, including the persistent prejudices around disability.

B. *The Impact of* Olmstead

The ADA's integration mandate was strengthened by the Supreme Court's decision in *Olmstead v. L.C. ex rel. Zimring*.[171] The plaintiffs in this case were two institutionalized women, Lois Curtis (L.C.) and Elaine Wilson (E.W.), who were dually diagnosed with intellectual and developmental disabilities and psychiatric disabilities.[172] They argued that once their treating physicians deemed them capable of receiving treatment within the community, their continued institutionalization in the state psychiatric facility violated the integration mandate of Title II of the ADA.[173] In finding for the plaintiffs, the Supreme Court held that

166. See 42 U.S.C. § 12101(a)(2) (2018).

167. 28 C.F.R. § 35.130(d) (2023).

168. 42 U.S.C. § 12101(b)(1); 28 C.F.R. § 35.130(d).

169. See Jasmine E. Harris, The Aesthetics of Disability, 119 Colum. L. Rev. 895, 903 (2019) (emphasis omitted) ("[T]he ADA is the only antidiscrimination statute with such a clear normative orientation and *remedial* mission.").

170. Id. at 922 (alterations in original) (internal quotation marks omitted) (quoting 136 Cong. Rec. 11,430 (1990) (statement of Rep. Collins)).

171. 527 U.S. 581 (1999).

172. See id. at 593 ("Respondents L.C. and E.W. are mentally retarded women; L.C. has also been diagnosed with schizophrenia, and E.W. with a personality disorder. Both women have a history of treatment in institutional settings.").

173. See id. at 594 ("L.C. alleged that the State's failure to place her in a community-based program, once her treating professionals determined that such placement was appropriate, violated, *inter alia*, Title II of the ADA. . . . E.W. intervened in the action, stating an identical claim.").

the "unjustified isolation" of people with intellectual disabilities could constitute discrimination under Title II of the ADA.[174] The Supreme Court also recognized the profoundly isolating and stigmatizing impact of institutionalization:

> First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. . . . Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.[175]

Accordingly, the Court held that the State was obligated to ensure that people with disabilities were given reasonable accommodations so that they did not need to "relinquish participation in community life" to access necessary medical services.[176]

The Court was careful, however, to place limits on the state's obligations. First, the Court held that the state's medical professionals should agree that community-based treatment was appropriate for the individual.[177] In other words, the Court was careful to soften the requirement that people with mental disabilities be placed in the community if professionals deemed it inappropriate.[178] A second element was that the disabled person needed to agree to community placement.[179] The Court's framing of community placement as a reasonable accommodation meant that it incorporated language from Title II regulations stating that a person could not be forced to accept a reasonable accommodation.[180]

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174. See id. at 597.

175. Id. at 600–01.

176. Id. at 601.

177. This has not proven to be a significant hurdle to community integration. Lower courts have interpreted *Olmstead* to permit plaintiffs to rely on their own experts to demonstrate that they can be served in a community-based setting. See, e.g., Disability Advocs., Inc. v. Paterson, 653 F. Supp. 2d 184, 258–59 (E.D.N.Y. 2009), vacated on other grounds sub nom. Disability Advocs., Inc. v. N.Y. Coal. for Quality Assisted Living, Inc., 675 F.3d 149 (2d Cir. 2012); Joseph S. v. Hogan, 561 F. Supp. 2d 280, 291 (E.D.N.Y. 2008).

178. See *Olmstead*, 527 U.S. at 607 ("Title II of the ADA[] [requires] States . . . to provide community-based treatment . . . when the State's treatment professionals determine that such placement is appropriate, the affected persons [don't] oppose such treatment, and the placement can be reasonably accommodated, [considering] resources available to the State and the needs of others with mental disabilities.").

179. See id.

180. See id. at 602–03 ("Nothing in this part shall be construed to require an individual with a disability to accept an accommodation . . . which such individual chooses not to accept." (alteration in original) (internal quotation marks omitted) (quoting 28 C.F.R. § 35.130(e)(1) (1998))).

Third, the Supreme Court expressed some sympathy for the State of Georgia's argument that it had inadequate funding to place the plaintiffs in community settings.[181] Accordingly, the Court imposed a generous fundamental-alteration limitation, permitting the state to meet its obligations under the integration mandate if it "were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated."[182] In so doing, it placed an "exceptionally high burden on plaintiffs seeking services in a more integrated setting."[183] Finally, in a footnote, the Court also held that the ADA does not require states to provide a certain standard of care or level of benefits.[184] Its holding was a conservative one: States did not have to provide new services but, for the services they *did* provide, could not discriminate against people with disabilities.[185]

Despite these limitations, *Olmstead* marked a watershed in the integration movement. The decision's impact was surprising, not just because of the curial recognition that unjustified isolation constituted discrimination but also because of how wholeheartedly the executive branch embraced it.[186] Disability law scholar Robert Dinerstein notes that while the case had been brought on behalf of two individuals, the Supreme Court treated *Olmstead* as if it were a class action suit, opining broadly on the rights of people with disabilities.[187] The Court's decision was then embraced by the Clinton Administration in support of its policies.[188] Secretary of Health and Human Services Donna Shalala extolled the decision and stated that it embraced the goal of "a nation that integrates people with disabilities into the social mainstream, promotes equality of opportunity, and maximizes individual choice."[189] In 2001, President George W. Bush issued

181. See id. at 597 ("In evaluating a State's fundamental-alteration defense, the [court] must consider, in view of the resources available to the State, . . . the cost of providing community-based care to the litigants, . . . the range of services the State provides others with mental disabilities, and [its] obligation to . . . [offer] those services equitably.").

182. Id. at 605–06 (plurality opinion).

183. Salzman, supra note 36, at 191.

184. See *Olmstead*, 527 U.S. at 603 n.14.

185. See id.

186. Robert Dinerstein, The *Olmstead* Imperative: The Right to Live in the Community and Beyond, 4 Inclusion 16, 18 (2016).

187. Id. But see United States v. Mississippi, 82 F.4th 387, 395–98 (5th Cir. 2023) (finding that *Olmstead* claims based on individualized determinations of discrimination could not support generalized determinations of the risk of institutionalization for a whole class of people).

188. Dinerstein, supra note 186, at 18.

189. Id. (internal quotation marks omitted) (quoting Enforcing the *Olmstead* Decision, Ctr. for an Accessible Soc'y, http://www.accessiblesociety.org/topics/persasst/Olmstead_shalala.htm [https://perma.cc/3FRM-8NLW] (last visited Jan. 4, 2024)) (describing and excerpting a speech by Donna Shalala, the then–HHS Secretary).

Executive Order No. 13217, "Community-Based Alternatives for Individuals with Disabilities," which placed on the federal government the responsibility to create community-based alternatives for individuals with disabilities.[190] Under the Obama Administration, the DOJ brought statewide investigations leading to letters of findings and consent decrees on behalf of people with disabilities across the country.[191] As Dinerstein writes, the "Executive Branch's embrace of *Olmstead* was critical in making sure that the decision stood for more than providing community-based services to two individuals."[192]

C. *The Expansive Vision of the Integration Mandate*

Courts have also played an important role in ensuring that *Olmstead* is enforced. Emphasizing the ADA's expansive purpose, courts have rejected states' attempts to narrow the reach of the mandate. For instance, courts have rejected the argument that a person may be eligible for community-based services only when the state's experts declare them capable of benefiting from a more integrated setting.[193] Courts have also rejected arguments that to state an *Olmstead* claim, plaintiffs must already be institutionalized like the plaintiffs in *Olmstead*.[194]

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190. Id. at 19.

191. Id.; see also *Olmstead*: Community Integration for Everyone, DOJ, C.R. Div., https://archive.ada.gov/olmstead/index.html [https://perma.cc/9TUB-B5NN] (last visited Nov. 4, 2023). Dinerstein notes that the DOJ brought statewide investigations leading to letters of findings and consent decrees on behalf of people with I/DD and psychiatric disability institutionalized in Delaware, Georgia, Mississippi, Nebraska, New Hampshire, Puerto Rico, and Virginia, extending the application of *Olmstead* to "all of a state's institutions," including nursing homes and adult care homes. Dinerstein, supra note 186, at 19.

192. Dinerstein, supra note 186, at 19.

193. See, e.g., Day v. District of Columbia, 894 F. Supp. 2d 1, 23 (D.D.C. 2012) (stating that "[s]ince *Olmstead*, lower courts have universally rejected the absolutist interpretation" that only the State could determine whether community-based services were appropriate for the plaintiff); Disability Advocs., Inc. v. Paterson, 653 F. Supp. 2d 184, 258–59 (E.D.N.Y. 2009) (stating that requiring a determination by professionals contracted by the State would "eviscerate the integration mandate" and permit the State "virtually unreviewable discretion" over the suitability of placement in the community), vacated on other grounds sub nom. Disability Advocs., Inc. v. N.Y. Coal. for Quality Assisted Living, Inc., 675 F.3d 149 (2d Cir. 2012).

194. See, e.g., Waskul v. Washtenaw Cnty. Cmty. Mental Health, 979 F.3d 426, 461 (6th Cir. 2020) (recognizing a "serious risk of institutionalization" claim as a violation of the integration mandate); Steimel v. Wernert, 823 F.3d 902, 914 (7th Cir. 2016) (holding that "the integration mandate is implicated where the state's policies have either (1) segregated persons with disabilities within their homes, or (2) put them at serious risk of institutionalization"); Davis v. Shah, 821 F.3d 231, 264 (2d Cir. 2016) (recognizing a violation of the integration mandate when New York's restrictions on orthopedic footwear and compression socks put the plaintiffs at risk of institutionalization); Fisher v. Okla. Health Care Auth., 335 F.3d 1175, 1181 (10th Cir. 2003) (stating that "nothing in the plain language of the regulations . . . limits protection to persons who are currently institutionalized" and that the ADA's protections "would be meaningless if plaintiffs were required to segregate

Perhaps most striking, however, is courts' endorsement of the application of the integration mandate to settings beyond institutions. Indeed, *Olmstead* jurisprudence reflects an emphasis on averting "the risk of segregation and isolation *within the community*."[195] DOJ guidance has aided courts in taking this approach by expanding upon the characteristics of an integrated setting versus a segregated one:

> Integrated settings are located in mainstream society; offer access to community activities and opportunities at times, frequencies and with persons of an individual's choosing; afford individuals choice in their daily life activities; and, provide individuals with disabilities the opportunity to interact with non-disabled persons to the fullest extent possible. . . . By contrast, segregated settings often have qualities of an institutional nature. Segregated settings include, but are not limited to: (1) congregate settings populated exclusively or primarily with individuals with disabilities; (2) congregate settings characterized by regimentation in daily activities, lack of privacy or autonomy, policies limiting visitors, or limits on individuals' ability to engage freely in community activities and to manage their own activities of daily living; or (3) settings that provide for daytime activities primarily with other individuals with disabilities.[196]

Notably, this guidance looks beyond the services' specific setting to whether the services promote values like privacy, autonomy, choice, and the ability to develop meaningful relationships with those without disabilities in the community. This has meant, as the Seventh Circuit noted in *Steimel v. Wernert*, that while *Olmstead* "dealt only with the problem of unjustified institutional segregation[,] . . . [i]ts rationale . . . reaches more broadly."[197]

Accordingly, courts have held that segregating individuals with disabilities in employment settings like sheltered workshops violates the integration mandate.[198] School systems that create separate programs that

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themselves by entering an institution before they could challenge an allegedly discriminatory law or policy"). The Fifth Circuit is a notable exception in departing from this well-established precedent. See United States v. Mississippi, 82 F.4th 387, 392 (5th Cir. 2023) (holding that "the ADA does not define discrimination in terms of a prospective risk to qualified disabled individuals").

195. Chin, supra note 36, at 389 (pointing to DOJ guidance and collecting cases in which courts have applied an expanded definition of the integration mandate as applying outside the confines of institutional walls).

196. Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*, DOJ (June 22, 2021), http://www.ada.gov/olmstead/q&a_olmstead.htm [https://perma.cc/6L5K-ZBQT] [hereinafter DOJ *Olmstead* Statement].

197. 823 F.3d at 910.

198. See, e.g., Ball ex rel. Burba v. Kasich, 244 F. Supp. 3d 662, 679 (S.D. Ohio 2017) ("[F]ederal law has since clarified that the integration mandate that applies to residential

isolate students with disabilities also violate the integration mandate.[199] In some cases, even isolation in one's own home can violate the integration mandate.[200] As the court noted in *Steimel*, the Supreme Court's goal was to prevent the "evils" of unjustified isolation in an institution, namely: (1) pernicious assumptions about the capability or worthiness of institutionalized people with disabilities to participate in community life and (2) the loss of opportunities to engage in everyday life activities, develop social relationships, attain economic independence, and participate in cultural enrichment.[201] The *Steimel* court argued that those "evils" could "exist in some settings outside of an institution."[202] Indeed, "isolation in [the] home may often be worse than confinement to an institution on [virtually] every . . . measure of 'life activities' that *Olmstead* recognized."[203]

This expansive interpretation of the integration mandate has contributed to disability advocates' efforts to apply *Olmstead* to policies that restrict or isolate people with disabilities. For instance, disability law scholar Natalie Chin argues that group homes violate the integration mandate when they adopt "overprotective and punitive sexuality policies" that sexually isolate people with disabilities.[204] Disability law scholar Leslie Salzman argues that the integration mandate could provide a way to challenge restrictive guardianship statutes that prevent people with disabilities from making "self-defining personal decisions" and deprive them of autonomy and opportunities to learn and develop their own decisionmaking abilities.[205]

The remainder of this Essay argues that the integration mandate can also be applied to policies that permit or mandate surveillance of people with disabilities. Part III provides three examples of such surveillance and

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services applies to employment and day programs as well."); Guggenberger v. Minnesota, 198 F. Supp. 3d 973, 1026–27 (D. Minn. 2016) (interpreting the integration mandate as applying across a wide array of settings); Jensen v. Minn. Dep't of Hum. Servs., 138 F. Supp. 3d 1068, 1072–73 (D. Minn. 2015) (approving the state's court-ordered amended "*Olmstead* Plan" aimed at making supported employment services for people with developmental disabilities more integrated); Lane v. Kitzhaber, 841 F. Supp. 2d 1199, 1205 (D. Or. 2012) (finding an expansive definition of the integration mandate appropriate given "the broad language and remedial purposes of the ADA, the corresponding lack of any limiting language in either the ADA or the integration mandate itself, and the lack of any case law restricting the reach of the integration mandate" (footnote omitted)).

199. See, e.g., United States v. Georgia, 461 F. Supp. 3d 1315, 1324–25 (N.D. Ga. 2020) (declining to dismiss proceedings, on the basis that the United States had sufficiently alleged that Georgia's educational program violated the integration mandate).

200. *Guggenberger*, 198 F. Supp. 3d at 1029 (holding that lack of service provision to disabled persons living in their own homes could plausibly contribute to "isolation and segregation" by preventing those persons from fully participating in the community).

201. See *Steimel*, 823 F.3d at 910.

202. See id.

203. Id. at 911 (quoting Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 601 (1999)).

204. Chin, supra note 36, at 431.

205. See Salzman, supra note 36, at 170.

demonstrates how ableist ideas of disability are translated into surveillance policies that are carceral in nature, depriving the people subject to them of privacy and autonomy, physically restricting their ability to access the community, and increasing their risk of institutionalization. Part IV then demonstrates how the integration mandate and *Olmstead* jurisprudence can be used to address and dismantle ableist surveillance practices.

III. ABLEIST SURVEILLANCE SYSTEMS

This Part argues that the carceral logic that once justified the institutionalization of people with disabilities continues to permeate modern surveillance policies. It tracks three examples of policies mandating the surveillance of people with disabilities in community-based settings: electronic monitoring devices in group homes, the use of Electronic Verification Systems in private residences, and threat-assessment processes in public schools. In each of these settings, surveillance is deployed with laudable goals, namely, protecting vulnerable people with disabilities from abuse and neglect, preventing the fraudulent use of limited Medicaid funds, and preventing acts of mass violence in schools. Turning to surveillance to achieve these goals, however, results in coercive social control and further marginalizes and isolates people with disabilities.

A. *Carceral Ableism and Surveillance in Group Homes*

On August 28, 2017, William Cray, a thirty-three-year-old man with I/DD living in a group home in Somers Point, New Jersey, was found dead on the floor of his bedroom closet.[206] An autopsy concluded that Cray had died of natural causes. In the months before his death, however, his mother, Martha Cray, had raised her concerns about unexplained bruises and injuries on his body with the operators of the state-licensed group home.[207] Although state agencies investigated these prior injuries, they always found the claims to be unsubstantiated.[208] Since her son's death, Martha Cray has pushed for additional oversight of group home residents, including the installation of electronic monitoring devices in group homes.[209]

206. Susan K. Livio, Her Disabled Son Died Alone in a Group Home Closet. Now N.J. May Require Group Homes to Install Cameras., NJ.com (Dec. 14, 2020), https://www.nj.com/politics/2020/12/her-disabled-son-died-alone-in-a-group-home-closet-now-nj-may-require-group-homes-to-install-cameras.html [https://perma.cc/5M9L-TM26].

207. Id.

208. Id.

209. Dana DeFilippo, Advocates Demand Cameras in Homes for Developmentally Disabled Adults to Reduce Abuse, N.J. Monitor (Dec. 5, 2022), https://newjersey monitor.com/2022/12/05/advocates-demand-cameras-in-homes-for-developmentally-disabled-adults-to-reduce-abuse/ [https://perma.cc/78EA-XZZ5].

People with disabilities, particularly intellectual and developmental disabilities, are vulnerable to abuse and neglect.[210] Such abuse can take place in spaces inaccessible to members of the public, like group homes.[211] For states to receive federal Medicaid funding under the Home and Community-Based Services (HCBS) waiver,[212] group home service providers must comply with rules developed by Centers for Medicare and Medicaid Services (CMS), a federal agency that administers the Medicaid program, and with state regulations aimed at preventing abuse and neglect.[213] Each state must give CMS specific information about the safeguards it has put in place to prevent abuse and neglect, including whether it operates a critical-event- or incident-reporting system.[214] States must provide specific information about how group homes will report and

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210. See, e.g., Joseph Shapiro, The Sexual Assault Epidemic No One Talks About, NPR (Jan. 8, 2018), https://www.npr.org/2018/01/08/570224090/the-sexual-assault-epidemic-no-one-talks-about [https://perma.cc/PJN8-E52E] ("[Unpublished DOJ data] show that people with intellectual disabilities . . . are the victims of sexual assaults at rates more than seven times those for people without disabilities. It's one of the highest rates of sexual assault of any group in America, and it's hardly talked about at all."). A 2013 study by the Spectrum Institute Disability and Abuse Project found that 70% of the 7,289 respondents who took the Institute's national survey reported experiencing some form of abuse or neglect. See Nora J. Baladerian, Thomas F. Coleman & Jim Stream, Spectrum Inst. Disability & Abuse Project, Abuse of People With Disabilities: Victims and Their Families Speak Out 1, 3 (2013), https://tomcoleman.us/publications/2013-survey-report.pdf [https://perma.cc/9B6B-YQSH].

211. See Michael J. Berens & Patricia Callahan, In Illinois Group Homes, Adults With Disabilities Suffer in Secret, Chi. Trib. (Nov. 21, 2016), https://www.chicagotribune.com/investigations/ct-group-home-investigations-cila-met-20161117-htmlstory.html (on file with the *Columbia Law Review*) ("The Tribune found at least 42 deaths linked to abuse or neglect in group homes or their day programs over the last seven years."); Benjamin Weiser & Danny Hakim, Residents Cowered While Workers at a Group Home Smacked and Pushed Them, N.Y. Times (June 9, 2019), https://www.nytimes.com/2019/06/09/nyregion/new-york-group-home-abuse.html (on file with *the Columbia Law Review*) (reporting that group home employees found to have committed abuse-related offenses at group homes were frequently "put back on the job").

212. 42 U.S.C. § 1396n(c) (2018). The HCBS waiver program permits a state to provide home and community-based services to make it possible for people to live within the community rather than in an institution. Home & Community-Based Services 1915(c), Medicaid.gov, https://www.medicaid.gov/medicaid/home-community-based-services/home-community-based-services-authorities/home-community-based-services-1915c/index.html [https://perma.cc/T49Y-23ET] (last visited Nov. 4, 2023). States like Arizona that provide community-based services under section 1115 of the Social Security Act (SSA), a provision that permits states to be exempt from certain provisions of the SSA, must also comply with CMS rules pertaining to the reporting of incidents of abuse and neglect. 42 U.S.C. § 1315.

213. 42 C.F.R. § 441.302 (2022).

214. See HHS Off. of Inspector Gen., Admin. for Cmty. Living & HHS Off. for C.R., Joint Report: Ensuring Beneficiary Health and Safety in Group Homes Through State Implementation of Comprehensive Compliance Oversight 5 (2018), https://www.oig.hhs.gov/reports-and-publications/featured-topics/group-homes/group-homes-joint-report.pdf [https://perma.cc/52KG-G935] [hereinafter HHS, Joint Report: Group Homes].

address critical incidents of abuse and neglect and must establish an investigation process.[215] Critical incidents that require a major level of review include deaths, physical and sexual assaults, unplanned hospitalizations, and serious injuries.[216] Despite these reporting requirements, group homes and community-based providers frequently fall short of their obligations to report critical incidents to be investigated.[217]

To address public concern about the protection of vulnerable people, some states have introduced legislation that permits the installation of electronic monitoring devices (EMDs), like "granny cams," in group homes.[218] Bills to this effect were proposed in New Jersey[219] (Mr. Cray's state of residence) and Massachusetts.[220] These bills' proponents see EMDs as a simple way to ensure a certain level of care in group homes—a form of consumer empowerment.[221]

Arizona is one state that has actually enacted legislation permitting group home service providers to install EMDs in group home common areas.[222] State Senator Nancy Barto, sponsor of Arizona's bill, touted the legislation's benefits: "By allowing video monitoring systems within [group homes], we will be able to give families peace of mind, accountability, [and] transparency, and potentially stop life-threatening conduct in its tracks."[223]

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215. See id.

216. Id. at 6 ("Critical incidents requiring a major level of review generally include deaths, physical and sexual assaults, suicide attempts, unplanned hospitalizations, near drowning, missing persons, and serious injuries. Critical incidents requiring a minor level of review generally include suspected verbal or emotional abuse, theft, and property damage.").

217. See id. at 7 (providing information on reporting failures in Connecticut, Maine, and Massachusetts as well as examples of unreported critical incidents).

218. See Karen Levy, Lauren Kilgour & Clara Berridge, Regulating Privacy in Public/Private Space: The Case of Nursing Home Monitoring Laws, 26 Elder L.J. 323, 335 (2019) (noting that Illinois, Louisiana, New Mexico, Texas, Utah, and Washington have laws and regulations permitting the installation of EMDs in nursing facilities).

219. See Billy Cray's Law, Gen. Assemb. 4013, 219th Leg., 2020–2021 Sess. (N.J. 2020).

220. See An Act Relative to Ensuring the Safety of Residents of Facilities Under the Authority of the Department of Mental Health and the Department of Developmental Services, H.R. 158, 191st Gen. Ct., Reg. Sess. (Mass. 2019).

221. See, e.g., Billy Cray's Law, Gen. Assemb. 5676, 220th Leg., 2022–2023 Sess. § 2(d) (N.J. 2023) ("The use of video surveillance in group homes . . . will enable consenting residents and their authorized representatives to more proactively and effectively review and ensure the propriety of care that is being provided to such residents . . . .").

222. Ariz. Rev. Stat. Ann. § 36-568 (2023).

223. Press Release, Ariz. State Senate Republican Caucus, Sen. Barto Strengthens Transparency and Oversight Inside Group Homes for Arizona's Most Vulnerable (May 24, 2022), https://www.azsenaterepublicans.com/post/sen-barto-strengthens-transparency-and-oversight-inside-group-homes-for-arizona-s-most-vulnerable [https://perma.cc/3EK7-NC9N] [hereinafter Ariz. Senate Republican Caucus Press Release] (internal quotation marks omitted) (quoting Sen. Barto).

The legislation outlines two ways in which EMDs may be introduced in an Arizona group home setting. First, a service provider that operates a group home, referred to in the legislation as a "qualified vendor,"[224] may install, oversee, and monitor EMDs, defined as video surveillance cameras and audio devices,[225] in a group home's common areas "unless any client or the client's responsible person objects to the installation of the electronic monitoring devices."[226] These devices may be installed in virtually any common space, including kitchens, living areas, employment spaces, and day program facilities.[227] The regulations give the service provider broad latitude to determine which personnel may access the recordings and under what circumstances and to train staff on the need to comply with HIPAA and maintain confidentiality.[228] Alternatively, a group home resident or their "responsible person" must be allowed to install and pay for EMDs if they wish to do so.[229] These devices may be installed in residents' bedrooms.[230] The qualified vendor may not turn EMDs off, move them, cover them, or otherwise obscure their ability to have "full view of the area chosen by the Responsible Person."[231]

As Senator Barto's comments indicate, this kind of surveillance is intended to protect vulnerable group home residents by "potentially stopping life-threatening conduct in its tracks."[232] As disability and feminist scholars have noted, however, being cast as vulnerable is a double-edged sword.[233] It can trigger a host of "'toxic associations'" that position

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224. Ariz. Rev. Stat. Ann. § 36-551(41).

225. Id. § 36-568(A), (F).

226. Id. § 36-568(A). "Responsible person," for an adult resident of a group home, is defined as "the guardian of an adult with a developmental disability or an adult with a developmental disability who is a client or an applicant for whom no guardian has been appointed." Id. § 36-551(40). If a guardian has been appointed, they have the power to consent or withdraw consent to the installation of EMDs. See id. § 36-568(A).

227. See id. § 36-568(A); see also Div. of Dev. Disabilities, Dep't of Econ. Sec., Provider Manual, Chapter 42: Electronic Monitoring in Program Sites 1 (2023), https://des.az.gov/sites/default/files/media/DDD_Provider_Manual_Chapter_42_Electronic_Monitoring_in_Program_Sites.pdf [https://perma.cc/2P9X-E4EV] [hereinafter Ariz. Dep't of Econ. Sec., Electronic Monitoring] (defining "common area" as "a room, including a hallway that is designed for use by multiple individuals, including residents").

228. See Ariz. Rev. Stat. Ann. § 36-568(C)(4)–(8) (requiring facility directors to "adopt rules regarding the use of electronic monitoring" in relation to the discussed categories); see also Ariz. Dep't of Econ. Sec., Electronic Monitoring, supra note 227, at 6 ("[The] Qualified Vendor shall . . . [s]pecify in policy how Electronic Monitoring Device recordings, regardless of format, will be secured to protect the confidentiality of residents . . . .").

229. Ariz. Rev. Stat. Ann. § 36-568(B).

230. Ariz. Dep't of Econ. Sec., Electronic Monitoring, supra note 227, at 9.

231. Id.

232. Ariz. State Senate Republican Caucus Press Release, supra note 223.

233. See, e.g., Shelley Bielefeld, Cashless Welfare Transfers for 'Vulnerable' Welfare Recipients: Law, Ethics and Vulnerability, 26 Feminist Legal Stud. 1, 2 (2018) ("The phrase 'vulnerability' is increasingly used across a range of law and policy areas, . . . yet there is

those characterized as vulnerable as being "immature, weak, helpless, passive, and 'unusually open to manipulation and exploitation,'" turning those individuals into "'stigmatized subjects.'"[234] Given the negative associations with vulnerability—immaturity, weakness, passivity, and exploitability—"the more vulnerable a disabled person is believed to be, the less likely it is that others will treat the choices [they] make[] or opinions [they] hold[] as worthy of respect."[235] The notion of vulnerability can thus be used in a manner that both socially and politically marginalizes people with disabilities. Professor Liat Ben-Moshe uses the term "carceral ableism" to describe protective measures like these that are undertaken to protect people with disabilities but result in further marginalization and isolation.[236]

The dynamic of marginalizing group home residents' opinions and perspectives in the name of protection can be seen at play within this piece of legislation, particularly in how it treats consent.[237] Arizona's EMD statute simply does not do enough to ensure that group home residents' opinions are sufficiently solicited and protected.[238] The statute hinges on consent—that is, a person or their "responsible person," who may be a legal guardian, can either choose to or refuse to consent to the installation of EMDs.[239] But consent is a complex issue, especially for people with significant disabilities. Some people with disabilities may not understand the implications of consenting to these measures or be able to effectively communicate their consent or lack thereof. Others may feel pressure to agree to surveillance from their "responsible people" or other residents.[240]

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concern about how this term can result in disempowerment for those to whom it is applied.").

234. Id. at 4 (internal quotation marks omitted) (first quoting Jackie Leach Scully, Disability and Vulnerability: On Bodies, Dependence, and Power, *in* Vulnerability: New Essays in Ethics and Feminist Philosophy 204, 210, 219 (Catriona Mackenzie, Wendy Rogers & Susan Dodds eds., 2014); then quoting Martha Albertson Fineman, The Vulnerable Subject: Anchoring Equality in the Human Condition, 20 Yale J.L. & Feminism 1, 8 (2008)).

235. Jackie Leach Scully, Disability and Vulnerability: On Bodies, Dependence, and Power, *in* Vulnerability: New Essays in Ethics and Feminist Philosophy 204, 209–210 (Catriona Mackenzie, Wendy Rogers & Susan Dodds eds., 2014).

236. See Ben-Moshe, Decarcerating Disability, supra note 12, at 17.

237. Senator Barto's comments make clear that the purpose of the legislation is to grant families, not group home residents themselves, "peace of mind." See Ariz. State Senate Republican Caucus Press Release, supra note 223.

238. Sociologist Karen Levy and her coauthors observe that in the context of nursing facilities, some states include measures that require court intervention before installing EMDs. See Levy et al., supra note 218, at 350 (discussing Washington State's requirement that a representative may consent on a resident's behalf only after receiving authorization from a court order). Arizonia's legislation does not require that additional oversight.

239. See Ariz. Rev. Stat. Ann. § 36-568(A) (2023) ("A service provider . . . may install [EMDs] . . . unless any client or the client's responsible person objects to the installation of the electronic monitoring devices.").

240. Written Testimony on Bill A4013 (Billy Cray's Law) from Gwen Orlowski, Exec. Dir., Disability Rights N.J., to N.J. Assembly Hum. Servs. Comm. (Dec. 10, 2020),

The statute offers no protections to ensure that the person has provided informed consent free from coercion or pressure.[241] And those with guardians may disagree with the decision made by their "responsible [people]" but have their wishes overridden.[242] The legislation and its accompanying rules do not clarify whose view will prevail if the person disagrees with their "responsible person."[243] This creates the potential for new vulnerabilities that the statute does not account for—namely, the risk that the responsible person could dismiss the person's privacy preferences, coerce them into agreement, or use the information collected by EMDs in abusive ways.[244]

Further, designating populations as "vulnerable" can facilitate the enactment of measures that undermine the autonomy, rights, and self-determination of people cast as requiring those additional protections.[245] Group homes are part of the continuum of community-based placements and services for people with I/DD and psychiatric disabilities.[246] They play a critical role in filling a gap in housing for people with severe disabilities who may struggle to find appropriate community-based

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https://disabilityrightsnj.org/wp-content/uploads/12102020-Assembly-Testimony-A4013-Billy-Crays-Law.pdf [https://perma.cc/N3C2-SKS3] [hereinafter DRNJ Testimony]. The then–Executive Director of Disability Rights New Jersey, Gwen Orlowski, raised this concern with respect to Billy Cray's Law, arguing that the "consent structure" contemplated by the law—namely, the requirement that consent to the installation of EMD is unanimous among residents—"creates a hostile environment" whereby the individual may be subject to "coercion from providers and housemates to accept EMDs if the majority requests them." Id.

241. Ariz. Rev. Stat. Ann. § 36-568.

242. The definition of "responsible person" is extremely unclear. See id. § 36-551(40) (defining "[r]esponsible person" as "the parent or guardian of a minor with a developmental disability, the guardian of an adult with a developmental disability or an adult with a developmental disability who is a client or an applicant for whom no guardian has been appointed"). One interpretation of the provision is that the term applies to "the guardian of an adult with a developmental disability" or "[the guardian of] an adult with a developmental disability who is a client" or an applicant for whom no guardian has been appointed. See id. In this case, the guardian's view prevails unless no guardian has been appointed. An alternate interpretation is that "responsible person" refers to both the "guardian of an adult with a developmental disability" and the adult with a developmental disability who is a "client," defined by the statute as a recipient of services. See id. § 36-551(14). If this interpretation is correct, a group home resident with a guardian may be able to argue that they are their own "responsible person." Even if this is the case, the legislation appears to presume that the person and their guardian will share the same opinion and does not clarify whose view will prevail if disagreement arises.

243. Id. § 36-551(40).

244. Levy et al., supra note 218, at 362 (noting that laws that fail to address the potential for conflict in decisions about camera use exacerbate the risk of abuse by family members who install cameras in nursing facilities).

245. See Scully, supra note 235, at 209–10.

246. See HHS, Joint Report: Group Homes, supra note 214, at 1.

accommodation.[247] Although group homes may be staffed for twenty-four hours per day, they are meant to "provide many individuals with greater independence, the choice to live in the community, and access to other opportunities."[248] Permitting surveillance systems to be installed in group homes profoundly compromises group home residents' ability to make autonomous and independent decisions about whom they interact with and how they do so. As disability scholars Anita Ho, Tim Stainton, and Anita Silvers write:

> Surveillance by its very nature can give others access to an individual's inner space, and the idea of being targeted may stimulate self-consciousness. People may feel demeaned when their seclusion or personal space is penetrated by uninvited spectators' eyes, and their development as persons may thereby be stultified. This experience of being violated may cast a chilling pall over the target subject's capacity to trust and become a deterrent to intimacy. . . . And it may have a chilling effect on the person's feeling free to form moral, political, and religious beliefs and to associate with others who embrace similar values and views.[249]

Arizona's EMD legislation prevents people from deciding even when and where they can be *seen*.[250] This constant monitoring, although intended to be protective, could be experienced as a "debilitating restriction"[251] on the lives and relationships of group home residents.[252]

A troubling element of carceral protectionism is the potential of protective measures to result in further harm to the very people they are

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247. See id. ("[C]ommunity-based settings, such as group homes, provide many individuals with greater independence, the choice to live in the community, and access to other opportunities.").

248. Id.

249. Anita Ho, Anita Silvers & Tim Stainton, Continuous Surveillance of Persons With Disabilities: Conflicts and Compatibilities of Personal and Public Goods, 45 J. Soc. Phil. 348, 355 (2014) (footnote omitted).

250. See supra notes 224–231 and accompanying text.

251. George Yancy, Institutions Often Treat Disability and Mental Health Not With Care but Violence, Truthout (June 15, 2023), https://truthout.org/articles/institutions-often-treat-disability-and-mental-health-not-with-care-but-violence/ [https://perma.cc/2S34-QD7V].

252. Christina Quinn, The Group Home Surveillance Camera Debate, GBH (July 23, 2012), https://www.wgbh.org/news/politics/2012-07-23/the-group-home-surveillance-camera-debate [https://perma.cc/254E-Q88N] (last updated Feb. 11, 2016) ("[I]magine the entire first floor of your home with a camera in every room: the living room, dining room, hallway and kitchen. Essentially the entire first floor of the house would resemble the set of the TV show 'Big Brother.'"); see also DRNJ Testimony, supra note 240 ("EMDs that monitor the individual's movements and activities in living quarters violate the privacy of the individual. . . . [I]magine being under constant surveillance while in your kitchen or living room attending to everyday activities. . . . [C]urrent CMS rules prohibit EMDs regardless of resident consent.").

meant to protect.[253] In this case, surveillance in group homes may be turned onto people within the group home who engage in disability-related behaviors to exclude or punish them. The information gathered could, for instance, be used as justification to exclude people who exhibit "inappropriate" behaviors. Indeed, proposed legislation in New Jersey explicitly permits "family members to promptly identify and respond to wrongdoing that may be committed by caregivers, guardians, staff, and *other persons* at the home."[254] Arizona's legislation does not restrict how surveillance footage may be used, particularly when EMDs are installed by family members. Accordingly, there is a real risk that surveilled group home residents will be penalized for engaging in disability-related behavior. At its most extreme, pharmaceutical or physical restraints could be used to manage the "risky" behavior of people with disabilities.[255]

B. *Surveillance and "Dis Inc."*

The political economy framework provides a helpful way to understand the surveillance of people with disabilities who receive public benefits. As disability scholars Marta Russell and Ravi Malhotra wrote, disabled bodies form a "central contradiction of capitalism."[256] On the one hand, policymakers perceive people with disabilities as a drain on resources.[257] When states need to tighten their belts, governments narrow the definition of "disability" and cut social programs.[258] Under this construction of disability, they justify surveillance of the disabled to control how and to whom resources are allocated.[259] Conversely, disability also *supports* the economy. Scholars and activists like Angela Davis and Ruth Gilmore Wilson have expounded on the notion of the prison–industrial complex.[260] Corporations associated with this "punishment industry"

253. See Krystle Shore, Targeting Vulnerability With Electronic Location Monitoring: Paternalistic Surveillance and the Distortion of Risk as a Mode of Carceral Expansion, 29 Critical Criminology 75, 81 (2021) (arguing that protective surveillance practices "often retain[] coercive elements and may ultimately contribute to a strengthening of state power through processes of carceral expansion").

254. Gen. Assemb. 5676, 220th Leg., 2022–2023 Sess. § 2(b) (N.J. 2023) (emphasis added).

255. See Ho et al., supra note 249, at 359–60 (noting that "the promised institutional benefit of security that continuous surveillance might bring must be assessed against the potential for the targets of scrutiny being harmed by institutional responses").

256. Marta Russell & Ravi Malhotra, Capitalism and the Disability Rights Movement, *in* Capitalism and Disability: Selected Writings by Marta Russell 9, 9 (Keith Rosenthal ed., 2019).

257. See id. at 10 (discussing how disabled people were excluded from the workplace because they could not add to their employer's net profits).

258. Id. at 11.

259. Ben-Moshe, Decarcerating Disability, supra note 12, at 11–13.

260. See Angela Y. Davis, Are Prisons Obsolete? 12, 14 (2003) ("Because of the extent to which prison building and operation began to attract vast amounts of capital—from the construction industry to food and health care provision—in a way that recalled the

reap profits and acquire a stake in continuing and preserving these incarceration sites.[261] In the same way, the interaction of "'disability incarcerated'" and "'Disability Incorporated,'" or "Dis Inc.," a term coined by Ben-Moshe, commodifies disability and funds the carceral sites and practices that are developed to "support" the disabled, including prisons, hospitals, and nursing homes—creating a disability–industrial complex.[262] The disabled body is commodified so that, as Russell and Malhotra observe, "social policies get created or rejected according to their market value."[263] In other words, public and private interests may collude to shape and benefit from these policies.

These conflicting narratives about disability can be observed in federal legislation that requires states to adopt EVV systems to monitor disabled peoples' use of Medicaid funds. In December 2016, Congress signed the 21st Century Cures Act (Cures Act) into law.[264] The legislation's purpose was manifold: to develop an accelerated way for the FDA to approve prescription drugs and medical devices, to fund various biomedical research programs, and to equip states to fight the opioid crisis.[265] The Cures Act also included a spate of Medicare and Medicaid reforms, including section 12006(a), which mandates that states implement EVV systems to track all Medicaid-funded home healthcare services and personal care systems.[266] The requirement to implement EVV has been called "the biggest federal public health initiative since the Affordable Care Act," affecting millions of people receiving community-based personal care services and hundreds of thousands of workers.[267]

Medicaid is jointly financed by the federal government and the states.[268] While Medicaid funding for long-term care and support was historically directed toward institutional settings like nursing homes, this

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emergence of the military industrial complex, we began to refer to a 'prison industrial complex.'" (quoting Mike Davis, Hell Factories in the Field: A Prison-Industrial Complex, Nation, Feb. 20, 1995, at 260)).

261. See id. at 16.

262. See Ben-Moshe, Decarcerating Disability, supra note 12, at 11–14 (arguing that the rise of the prison–industrial complex coincided with the deinstitutionalization of mental health).

263. Russell & Malhotra, supra note 256, at 11.

264. See 21st Century Cures Act, Pub. L. No. 114-255, 130 Stat. 1033 (2016) (codified as amended in scattered titles of the U.S.C.).

265. Press Release, White House, Statement by the Press Secretary on H.R. 34 (Dec. 13. 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/12/13/statement-press-secretary-hr-34 [https://perma.cc/23J7-W6ZV].

266. See 21st Century Cures Act sec. 12006(a), 130 Stat. at 1275.

267. Agency Workforce Mgmt., EVV Rules Across the USA 1, https://mitcagencies.com/wp-content/uploads/2021/02/EVV-Rules-Across-the-USA-eBook.pdf [https://perma.cc/JH9G-3NLZ] (last visited Oct. 4, 2023).

268. See Elizabeth Williams, Robin Rudowitz & Alice Burns, Medicaid Financing: The Basics, KFF (Apr. 13, 2023), https://www.kff.org/medicaid/issue-brief/medicaid-financing-the-basics/ [https://perma.cc/9R6Z-7BK5].

trend has changed over the past decade.[269] The majority of Medicaid spending has shifted to home and community-based services, including personal care services (PCS).[270] PCS are critical to providing community-based care to people of all ages who, because of disability, require assistance with performing activities of daily living, including bathing, dressing, toileting, and grocery shopping.[271]

In a 2017 statement submitted to the House of Representatives Subcommittee on Oversight and Investigations, the U.S. Government Accountability Office (GAO) reported that different systems employed by states across various programs resulted in inconsistent reporting from states, making it difficult to identify potential fraud and abuse.[272] The GAO concluded that "[p]ersonal care services are at high risk for improper payments[,] and beneficiaries may be vulnerable and at risk of unintentional harm."[273] To address this problem, the GAO recommended that CMS take steps to "harmonize and achieve a more consistent application of program requirements."[274]

To increase federal oversight of PCS programs operated by states, section 12006(e) of the Cures Act, which added section 1903(l) to the Social Security Act, mandates that each visit made by a Medicaid-funded home healthcare aide or PCS provider to assist a consumer with a disability be tracked through an EVV system.[275] Specifically, states must implement EVV systems that capture the following pieces of information: (1) the type of service performed, (2) the individual receiving the service, (3) the date of the service, (4) the location of service delivery, (5) the individual providing the service, and (6) the time the service begins and ends.[276] Guidance from CMS describes EVV as "a critical component of states' fiscal integrity processes and oversight."[277] In short, payment for the services is contingent on the accurate recording of these services. If states fail to implement an EVV system, they risk losing millions of dollars in Medicaid funding.[278]

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269. See Combating Waste, Fraud, and Abuse in Medicaid's Personal Care Services Program: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Com., 115th Cong. 30 (2017) (prepared statement of Katherine M. Iritani, Dir., Health Care, Gov't Accountability Off.).

270. See id.

271. See id. at 30–31.

272. See id. at 48.

273. Id. at 51.

274. Id. at 45.

275. See 42 U.S.C. § 1396b(l) (2018).

276. See id. § 1396b(l)(5).

277. Ctrs. for Medicare & Medicaid Servs., 1915(c) Home and Community-Based Waiver Application Job Aid 2 (2022), https://www.medicaid.gov/medicaid/home-community-based-services/downloads/documenting-evv.pdf [https://perma.cc/W2DD-6ZNQ].

278. 42 U.S.C. § 1396b(l)(1).

Despite the significant stakes, neither the Cures Act nor CMS guidance have clearly explained how EVV systems should be implemented.[279] As a result, states have wide latitude to determine how they will gather this information.[280] Because EVV's legislative goal is to address fraud, several states have adopted EVV systems that have broad capabilities to capture and monitor all consumer and provider activities.[281] Some states have implemented EVV systems that use global positioning systems (GPS) to track service providers' locations.[282] Another method used to gather the information required by the Cures Act involves the use of biometric voice-authentication systems that require the worker or consumer to log in and out by calling from a cellular or landline device.[283]

Legislation mandating the use of EVV systems is a striking manifestation of the narratives of fraud and the disability con that have always haunted benefits payments to people with disabilities.[284] The rhetoric used to promote EVV is that of rampant PCS fraud.[285] And yet there is little evidence of this rampant fraud.[286] In states like California, with the largest

279. Section 12006(c)(2) of the Cures Act provides that "[n]othing in the amendment made by this section shall be construed to require the use of a particular or uniform electronic visit verification system . . . by all agencies or entities that provide personal care services or home health care under a State Plan" or waiver under the SSA. 21st Century Cures Act, Pub. L. No. 114-255, sec. 12006(c)(2), 130 Stat. 1033, 1278 (2016).

280. See Mateescu, supra note 37, at 8 (noting that due to a lack of federal policy guidance, "[s]tate-level policies and technology design encoded far more invasive features into EVV systems than were required").

281. See id. at 15–16.

282. See, e.g., Jacob Metcalf, When Verification Is Also Surveillance, Data & Soc'y: Points (Feb. 27, 2018), https://medium.com/datasociety-points/when-verification-is-also-surveillance-21edb6c12cc9 [https://perma.cc/5L6T-MPNY] (analyzing Ohio's implementation of EVV that sends users a device produced by data services company Sandata with cameras and microphones, which uses voice verification to confirm logged work and GPS to track service providers' locations).

283. See id.

284. See Marta Russell, Targeting Disability, Monthly Rev. (Apr. 1, 2005), https://monthlyreview.org/2005/04/01/targeting-disability/ [https://perma.cc/65QM-BQ8J] ("Over the years, hard-right critics of SSDI have deemed it rife with fraud. Congresspersons have spoken of the dilemma of disability 'dependency' and accused the program's growth of being out of control.").

285. See Ctr. for Medicaid & CHIP Servs., Ctrs. for Medicare & Medicaid Servs., Leveraging Electronic Visit Verification (EVV) to Enhance Quality Monitoring and Oversight in 1915(c) Waiver Programs 17 (2020), https://www.medicaid.gov/sites/default/files/2020-02/evv-enhance-quality.pdf [https://perma.cc/3BNK-GT5V] ("EVV requirements were included in the Cures Act in response to long-standing fraud, waste, and abuse (FWA) concerns for Medicaid PCS and HHCS." (emphasis omitted)).

286. Electronic Visit Verification (EVV) Task Force Statement of Principles and Goals, Nat'l Council on Indep. Living (Oct. 15, 2018), https://www.ncil.org/wp-content/uploads/2018/10/10-15-18-EVV-Principles-and-Goals.pdf [https://perma.cc/DJX7-XHKQ] [hereinafter Task Force Statement of Principles and Goals]. Disability groups like the National Council on Independent Living have argued that the legislation builds on a "[n]egative stereotype[] that individuals with disabilities who rely on benefits programs are malingerers." Id.

direct care workforce, disability advocacy groups like the National Council on Independent Living note that the PCS fraud rate was extremely low—just 0.04% in 2014.[287]

The EVV policy is also an example of a policy driven by both public and private interests. As noted by scholars like Ben-Moshe and Russell, Dis Inc. and institutionalization go hand in hand.[288] The adoption of EVV has contributed to the creation of a robust surveillance technology industry. While the state has traditionally been the key player in carrying out surveillance activities, private companies are playing a bigger role in marketing and developing surveillance tools.[289] In this case, companies that develop EVV systems lobbied for EVV to be included within the Cures Act.[290] One of these companies, Sandata Technologies, has contracted to be the state provider of EVV services for Arizona, Colorado, Connecticut, Hawaii, Idaho, Illinois, Indiana, Maine, Missouri, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, Wisconsin, and the District of Columbia.[291] Surveilling the disabled is clearly a lucrative business, and these entities have every incentive to continue this surveillance.[292]

PCS surveillance has isolated and segregated people with disabilities in their own homes. GPS tracking and "geofencing"[293] discourage people

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287. Mateescu, supra note 37, at 16. When Medicaid fraud is identified, institutional rather than individual actors tend to be the perpetrators behind the high-profile cases. Id. Rather than focusing on institutional accountability and liability, however, the Cures Act places the onus on individual workers and their clients. See id.

288. See Ben-Moshe, Decarcerating Disability, supra note 12, at 11–13; Russell & Malhotra, supra note 256, at 11.

289. See Virginia Eubanks & Alexandra Mateescu, 'We Don't Deserve This': New App Places US Caregivers Under Digital Surveillance, The Guardian (July 28, 2021), https://www.theguardian.com/us-news/2021/jul/28/digital-surveillance-caregivers-artificial-intelligence [https://perma.cc/XL8T-FLTR] (discussing an increase in implementation of EVV, catalyzed in part by technology companies and lawmakers' contentions that EVV would improve home care by increasing efficiency and reducing abuse).

290. See Kendra Scalia, Electronic Visit Verification (EVV) Is Here, Disability Visibility Project (Mar. 24, 2019), https://disabilityvisibilityproject.com/2019/03/24/electronic-visit-verification-evv-is-here/ [https://perma.cc/2BLE-E39V] ("[V]endors have done a decent job controlling much of the conversation . . . [arguing] that consumers and employers commit fraud on such a regular basis that only the most intrusive EVV systems will protect a state.").

291. See Taylor Mallory Holland, What Are the EVV Compliance Rules in Your State?, Insights (July 19, 2021), https://insights.samsung.com/2021/07/19/what-are-the-evv-compliance-rules-in-your-state-4/ [https://perma.cc/767N-SW6R].

292. See Scalia, supra note 290 ("[EVV vendors] are uniquely positioned to make billions of dollars selling their EVV products to states.").

293. See Jane Lawrence, Applied Self-Direction, Electronic Visit Verification (EVV): A Blueprint for Self-Direction 9 (2018), https://www.appliedselfdirection.com/sites/default/files/EVV%20Blueprint%20for%20Self-Direction.pdf [https://perma.cc/4VYZ-35Y7] (defining geofencing as "a virtual geographic boundary, defined by a global positioning system (GPS) or other technology, that enables software to trigger a response when a mobile device enters or leaves a particular area").

and their aides from leaving their homes because of the risk that those entries will be flagged as fraudulent.[294] For people who self-direct their services—that is, make their own decisions about whom to hire and what services they receive—EVV systems undermine the flexibility of self-direction by introducing rigid rules about when and where services must be provided.[295] Punitive EVV systems unduly burden a workforce that is essential to the mission of ensuring that people can reside within the community rather than in institutions. Missed clock-ins or technical glitches can result in shifts being rejected or flagged for noncompliance, resulting in workers being inadequately paid for their time.[296] The diminution of this workforce magnifies the threat of institutionalization of those who depend on that care to remain in the community.[297]

Attempts to roll back the scope of EVV systems to limit their intrusiveness have been met with resistance. In 2019, Disability Rights California and other advocates, collaborating with the California Department of Social Services, developed an EVV solution that expanded on the existing electronic timesheet system and permitted home care workers to manually enter the general location—"home" or "community"—where they provided services.[298] CMS refused to approve the use of this less-invasive system on the basis that "such a system would not be sufficient for electronically verifying the six data elements" required by the Cures Act.[299] Legislative attempts to limit the use of invasive surveillance technologies like GPS and biometric verification in EVV systems have also stalled.[300] By December 2021, forty states had

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294. See Eubanks & Mateescu, supra note 289 ("The EVV app incorporates GPS to verify a home care worker's location and a feature called 'geofencing'. It establishes a maximum distance around a client's home inside which a care worker is allowed to clock in or out without getting flagged as noncompliant.").

295. See id. (relating the problems EVV poses to people who self-direct their care).

296. See id. ("[One home care worker] downloaded the state's EVV app . . . and began to use it. But it was frequently glitchy. Her 13-26 April timesheet was denied for 'insufficient funds,' which made no sense to [her client] . . . . She was out $900 for two weeks' work.").

297. See id. (noting the "freedom and stability" one home care worker provides her client).

298. See Mateescu, supra note 37, at 14; DRC Position on Electronic Visit Verification (EVV), Disability Rts. Cal. (Dec. 12, 2020), https://www.disabilityrightsca.org/legislation/drc-position-on-electronic-visit-verification-evv [https://perma.cc/N243-DRJZ] (last updated Feb. 2023).

299. Ctrs. for Medicare & Medicaid Servs., CMCS Informational Bulletin: Additional EVV Guidance 3 (2019), https://www.medicaid.gov/sites/default/files/Federal-Policy-Guidance/Downloads/cib080819-2.pdf [https://perma.cc/7C4U-5AWN].

300. See Cures 2.0 Act, H.R. 6000, 117th Cong. § 409 (2021) ("Section 1903(l)(5)(A) of the Social Security Act (42 U.S.C. 1396b(l)(5)(A)) is amended by inserting '(without the use of geographic tracking or biometrics)' after 'electronically verified.'"); H.R. 6000 (117th): Cures 2.0 Act, GovTrack, https://www.govtrack.us/congress/bills/117/hr6000 [https://perma.cc/4H25-DKF8] (last visited Oct. 4, 2023) (indicating that the Cures 2.0 Act never received a vote).

implemented EVV systems, and all used GPS in some form.[301] Many states were also using biometric identification in their systems.[302] State agencies voiced concerns that "[t]he [surveillance-limiting] changes proposed [in a federal bill to modify the Cures Act] would further increase overall costs to the state and federal governments."[303] That revision has stalled, meaning that EVV in its current form is here to stay for the foreseeable future.

C. *Carceral Humanism, Surveillance, and "Dangerous" Behavior*

In the wake of school shooting incidents, school administrators, lawmakers, and impacted communities across the country have pushed for intense surveillance of students to promote school safety.[304] Some states, like Florida, have introduced legislation mandating the creation and implementation of surveillance systems to identify any "threats" that may be present in schools. This legislation was spurred by the killing of seventeen people at Marjory Stoneman Douglas High School by a former student.[305] The Marjory Stoneman Douglas Public Safety Commission ("the Commission"),[306] which was established in the months after the shooting,[307] concluded that there had been warning signs that had not

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301. See Letter from Martha A. Roherty, Exec. Dir., Advancing States, Mary P. Sowers, Exec. Dir., Nat'l Ass'n of State Dirs. of Developmental Disabilities Servs. & Matt Salo, Exec. Dir., Nat'l Ass'n of Medicaid Dirs., to Reps. Diana DeGette & Fred Upton (Dec. 31, 2021), https://medicaiddirectors.org/wp-content/uploads/2022/02/State-Associations-Request-Removal-of-EVV-GPS-Ban-from-21st-Century-Cures-Act_pdf.pdf [https://perma.cc/P3AA-XVCT] [hereinafter State Associations Letter].

302. See id. (referencing "[s]tates using certain biometric features, such as fingerprint or voice verification").

303. Id.

304. See, e.g., Shawna Reid & Jamie Braun, Fla. Dep't of Educ., Florida Schools Safety Portal & Safety Monitoring 4 (2019), http://www.fdle.state.fl.us/MSDHS/Meetings/2019/August/August-15-200pm-Florida-Schools-Safety-Presentatio.aspx [https://perma.cc/7ZCK-U73E] (describing social media monitoring of Florida students).

305. Jon Schuppe, Florida Governor Signs 'School Safety' Bill That Could Arm Teachers, NBC News (Mar. 9, 2018), https://www.nbcnews.com/news/us-news/florida-governor-signs-school-safety-bill-could-arm-teachers-n855311 [https://perma.cc/E6SS-WCEZ].

306. Located within the Florida Department of Law Enforcement, the Commission was formed to analyze the shootings that have occurred across Florida and recommend system improvements. Marjory Stoneman Douglas High School Public Safety Commission, Fla. Dep't of L. Enf't, https://www.fdle.state.fl.us/MSDHS/Home.aspx [https://perma.cc/J5LK-WTN2] (last visited Oct. 4, 2023).

307. Marjory Stoneman Douglas High Sch. Pub. Safety Comm'n, Initial Report Submitted to the Governor, Speaker of the House of Representatives and Senate President 7 (2019), http://www.fdle.state.fl.us/MSDHS/CommissionReport.pdf [https://perma.cc/2DDH-WETH] [hereinafter Commission Report] (noting that the Commission was a key component of the Marjory Stoneman Douglas High School Public Safety Act that was signed into law on March 9, 2018—one month after the shooting at Marjory Stoneman Douglas High School).

been reported to law enforcement until the shooting had occurred.[308] It concluded that "people need to report more of what they see and hear."[309] The Florida legislature passed the Marjory Stoneman Douglas High School Public Safety Act on February 14, 2018, with the purpose of "comprehensively address[ing] the crisis of gun violence," including gun violence on campuses, through "enhanced coordination between education and law enforcement entities at the state and local level."[310]

Under this Act, Florida public schools must create and implement systems that subject students, particularly students with disabilities, to near-constant surveillance. Schools must create "threat assessment teams" (TATs) composed of teachers, mental health professionals, and law enforcement officers.[311] These teams' purpose is to identify "threats," broadly defined to include "an expression of intent to harm someone that may be spoken, written, gestured, or communicated in some other forms, such as text message or email."[312] They may be "explicit or implied, directed at the intended target or communicated to a third party."[313] To facilitate the reporting of threats, the Florida legislature has created and funded a statewide mobile suspicious activity reporting tool called FortifyFL.[314] Anyone may download the app and anonymously submit a

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308. See Marjory Stoneman Douglas High Sch. Pub. Safety Comm'n, Unreported Information Showing Nikolas Cruz's Troubling Behavior 3 (2018), https://schoolshooters.info/sites/default/files/Unreported%20Information%20Showing%20Nikolas_Cruz_Troubling_Behavior.pdf [https://perma.cc/27D7-R53M] ("We have identified at least 30 people who had knowledge of troubling behavior Cruz exhibited prior to the MSDHS shooting that was not reported or it was reported but not acted upon." (emphasis omitted)).

309. Id. at 4.

310. See Marjory Stoneman Douglas High School Public Safety Act, ch. 2018-3, § 2, 2018 Fla. Laws 6, 10.

311. Fla. Dep't of Educ., Form BTAP-2022, Model Behavioral Threat Assessment: Policies and Best Practices for K–12 Schools 7 (2022), https://www.fldoe.org/core/fileparse.php/18612/urlt/threat-assessment-model-policies.pdf [https://perma.cc/6NM5-JYLJ] [hereinafter Model Behavioral Threat Assessment].

312. Form CSTAG-2022, Threat Assessment and Response Protocol: Comprehensive School Threat Assessment Guidelines, Fla. Dep't of Educ. (June 2022), https://www.fldoe.org/core/fileparse.php/18612/urlt/FLStandSWBehavAssess.pdf [https://perma.cc/QJ4N-2MLW] [hereinafter Comprehensive School Threat Assessment Guidelines].

313. Id.

314. See Fla. Stat. Ann. § 943.082 (West 2023) ("In collaboration with the Department of Legal Affairs, the [Department of Law Enforcement] shall competitively procure a mobile suspicious activity reporting tool that allows students and the community to relay information anonymously concerning unsafe, potentially harmful, dangerous, violent, or criminal activities, or the threat of these activities . . . ."); How It Works, FortifyFL, https://getfortifyfl.com/#howitworks [https://perma.cc/SK6L-JS2F] (last visited Nov. 4, 2023). The app was named by students from Marjory Stoneman Douglas High School, and its rollout was coordinated by the Florida Office of the Attorney General, Department of Education, and Department of Law Enforcement. Press Release, Fla. Dep't of Educ., Florida Launches Suspicious Activity Reporting App for Students (Oct. 8, 2018),

tip, which is then reported automatically to school officials, local law enforcement, and state-level officials.[315] Florida lawmakers have also introduced a statewide database that "combine[s] individuals' educational, criminal justice, and social service records with their social media data, then share[s] it all with law enforcement."[316] Features of the Social Media Monitoring Tool include real-time monitoring and geofencing as well as automatic notifications at the state, district, and school levels.[317]

Once the TAT identifies a student as having made a threat, the team assesses the "threat" using a standardized statewide behavioral-assessment instrument[318] and categorizes the threat as either transient[319] or substantive.[320] Depending on how the threat is categorized, the TAT has broad authority to take a multitude of actions. If conduct is deemed a serious or very serious substantive threat, TATs may refer the student to mental health or counseling services or report them to law enforcement.[321] They may also suspend students or require them to comply with certain readmission conditions to come back to school.[322] The Act authorizes broad disclosure of information to other agencies—including law enforcement agencies, the Department of Children and Families, and the Agency for Persons with Disabilities—about the student deemed to be experiencing or at risk of an "emotional disturbance or a mental illness."[323] All these agencies must "communicate, collaborate, and coordinate efforts to serve such students."[324]

These processes specifically target students with disabilities. The Commission specifically recommended that students with individualized education programs (IEPs) and "severe behavioral issues" be referred to

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https://www.fldoe.org/newsroom/latest-news/florida-launches-suspicious-activity-reporting-app-for-students.stml [https://perma.cc/S5EJ-S47Q].

315. See How It Works, supra note 314.

316. Benjamin Herold, Schools Are Deploying Massive Digital Surveillance Systems. The Results Are Alarming, Educ. Wk. (May 30, 2019), https://www.edweek.org/technology/schools-are-deploying-massive-digital-surveillance-systems-the-results-are-alarming/2019/05 (on file with the *Columbia Law Review*).

317. See Reid & Braun, supra note 304, at 2.

318. Fla. Stat. Ann. § 1001.212(12) (West 2023).

319. See Model Behavioral Threat Assessment, supra note 311, at 7 (characterizing "transient threats" as those that involve "[no] sustained intent to harm" and that "can be resolved with an apology, retraction or explanation by the person who made the threat").

320. See id. (describing "substantive threats" as all nontransient threats, "serious substantive threats" as threats to "hit, fight or beat up another person," and "very serious substantive threats" as threats to "kill, rape or cause serious injury with a weapon").

321. See id. at 17.

322. See id. at 18.

323. Marjory Stoneman Douglas High School Public Safety Act, ch. 2018-3, § 24, 2018 Fla. Laws 6, 43 (codified at Fla. Stat. Ann. § 1006.07(7)(g)).

324. Id.

and evaluated by the TAT.[325] Florida's behavioral-threat-assessment instrument specifies the factors that may require TAT intervention. These include a history of serious depression or mental illness, qualification for special education services due to emotional or behavioral disturbance, and use of prescribed psychotropic medication.[326] When they initially register for school, students must disclose if they have been referred to mental health services and, in some school districts such as Miami-Dade, enumerate "each and every service."[327]

These punitive surveillance processes are an example of "carceral humanism," a term coined by scholar and activist James Kilgore to refer to the "repackaging" of punishment as care.[328] Kilgore identifies two ways in which the "repackaging" of mass incarceration manifests.[329] The first is "carceral humanism," which manifests by positioning elements of the carceral state—corrections authorities, jails, and prisons—as social service providers.[330] Threat-assessment processes are not meant to be punitive. Law enforcement, however, is a necessary presence on Florida TATs.[331] Law enforcement officers are heavily involved in gathering data about a student, assisting the team with accessing criminal justice information, and making decisions about the risk posed by the individual.[332] Law enforcement is thus positioned as an important part of a process that aims to take ostensibly therapeutic measures and funnel services to students regarded as threats. Kilgore notes that the second way mass incarceration repackaging manifests is through "non-alternative alternative[s] to incarceration," which often employ processes that may be well-intentioned but involve "heavy monitoring of a person's behavior."[333] In this case, TATs may monitor students indefinitely. Florida Department of Education guidance provides, "Many cases should be kept open and subject to periodic review until the student is no longer attending that school."[334]

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325. Commission Report, supra note 307, at 294.

326. See Comprehensive School Threat Assessment Guidelines, supra note 312.

327. Diane Rado, Stigmatizing Kids? New Law Forces Families to Disclose Student's Mental Health Treatment, Fla. Phoenix (July 11, 2018), https://floridaphoenix.com/2018/07/11/stigmatizing-kids-new-law-forces-families-to-disclose-students-mental-health-treatment/ [https://perma.cc/JP9K-2B49] (internal quotation marks omitted) (quoting the Miami-Dade County school registration form used at the time of the article's publication).

328. See Kilgore, supra note 31.

329. See id.

330. See id.

331. Fla. Stat. Ann. § 1006.07(7)(b) (West 2023).

332. See Model Behavioral Threat Assessment, supra note 311, at 10 ("Having an active, sworn law enforcement officer on the threat assessment team is essential because an officer has unique access to law enforcement databases and resources that inform the threat assessment process.").

333. See Kilgore, supra note 31.

334. Model Behavioral Threat Assessment, supra note 311, at 18.

This dynamic of punishment and ostensibly "therapeutic" interventions adversely affects students with disabilities, who are disciplined by threat-assessment processes at a disproportionate rate. Dewey Cornell, the developer of the Threat Assessment Risk model used in Virginia and adopted by Florida, observed that students with disabilities were 3.9 times more likely to be referred for a threat-assessment test than their nondisabled peers.[335] Further, the responses to the threats are typically punitive, regardless of whether the threat is transient or substantive. While school teams classified approximately two-thirds of threats as "low risk" or "transient," the schools reported administering disciplinary action in 71% of those cases.[336] Subject to heavy behavioral monitoring, students may be forced to comply with treatment and limitations on association and movement.[337] If they are unable or fail to comply, they may face suspension, civil commitment, incarceration in prisons and jails, or referral to immigration authorities or child protective services.[338] In sum, students with disabilities face the risk of being typecast as dangerous and thus excluded from school and incarcerated.

IV. APPLYING *OLMSTEAD* TO ABLEIST SURVEILLANCE SYSTEMS

This Part analyzes each of the examples of surveillance discussed above through the lens of the integration mandate. The purpose of this analysis is twofold: (1) to draw attention to the isolating impact of ableist surveillance practices on people with disabilities and (2) to demonstrate how the mandate can be used to disrupt and dismantle these systems of surveillance, functioning as a tool of resistance.

To that end, to make out a prima facie claim of discrimination under Title II of the ADA, one must establish that (1) the plaintiff is a "qualified individual" with a "disability" within the meaning of the ADA, (2) the defendant is a public entity or a recipient of federal funding, and (3) the surveillance system deployed by the public entity constitutes disability-based discrimination.[339] A further consideration is whether placement can be reasonably accommodated by the state or whether it constitutes a

335. See Dewey Cornell & Jennifer Maeng, Student Threat Assessment as a Safe and Supportive Prevention Strategy: Final Technical Report 24 (2020), https://www.ojp.gov/pdffiles1/nij/grants/255102.pdf [https://perma.cc/XF43-VRL4].

336. See id. at 17.

337. See id.

338. See id.; see also Nat'l Disabilities Rts. Network, K-12 Threat Assessment Processes: Civil Rights Impacts 3–4 (2022), https://www.ndrn.org/wp-content/uploads/2022/02/K-12-Threat-Assessment-Processes-Civil-Rights-Impacts-1.pdf [https://perma.cc/KG4P-KAH6].

339. See, e.g., Dean v. Univ. at Buffalo Sch. of Med. & Biomedical Scis., 804 F.3d 178, 187 (2d Cir. 2015) (citing Powell v. Nat'l Bd. of Med. Exam'rs, 364 F.3d 79, 85 (2d Cir. 2004)).

"fundamental alteration" of the public entity's programs, services, and activities.[340]

A. *Overprotective Rules in Group Homes*

1. *Group Home Residents: "Qualified Individuals With Disabilities".* — To bring a claim that Arizona's EMD legislation violates the integration mandate,[341] a plaintiff must demonstrate that they are a person with a "disability";[342] that is, that they have "a physical or mental impairment that substantially limits one or more major life activities."[343] This definition is meant to be broadly construed. In response to a series of Supreme Court decisions[344] that narrowly construed the definition of "disability," Congress

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340. Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 603 (1999) (plurality opinion). In addition to this requirement, the *Olmstead* plurality held that it was necessary to demonstrate that community-based services were appropriate for the person. See id. at 607 (majority opinion). Courts routinely permit plaintiffs to rely on determinations from their own medical service providers that they would be able to benefit from services in the community. See, e.g., United States v. Georgia, 461 F. Supp. 3d 1315, 1323 (N.D. Ga. 2020); Joseph S. v. Hogan, 561 F. Supp. 2d 280, 291 (E.D.N.Y. 2008); Frederick L. v. Dep't of Pub. Welfare, 157 F. Supp. 2d 509, 540 (E.D. Pa. 2001). Further, the affected people must not oppose movement into the community. *Olmstead*, 527 U.S. at 607. The analysis undertaken in this Part presumes that any plaintiffs in a suit are qualified to receive services in a more integrated setting and that they do not oppose integrated services or settings.

341. Title II of the ADA and Section 504 of the Rehabilitation Act contain language that is nearly identical in nature. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (2018). Section 504 provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a) (2018). It is worth noting, however, that under Section 504 the discrimination must be "solely by reason of . . . disability." 29 U.S.C. § 794(a); see also 28 C.F.R. § 41.51 (2023). In the context of the integration mandate, courts have found it unnecessary to analyze the "solely by reason of . . . disability" standard when the plaintiff is "alleging a violation of the integration mandate because the discrimination—undue isolation—stems from a failure to satisfy an affirmative duty, regardless of discriminatory intent." See Guggenberger v. Minnesota, 198 F. Supp. 3d 973, 1032 (D. Minn. 2016).

342. 42 U.S.C. § 12131(2).

343. Id. § 12102(1)(A). The meaning of "disability" is meant to be read broadly:

> Consistent with the ADA Amendments Act's purpose of reinstating a broad scope of protection under the ADA, the definition of "disability" in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of "disability."

28 C.F.R. § 35.101(b).

344. See Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002) (holding that to be "substantially limited," a person must be "prevent[ed] or severely restrict[ed]"

passed the ADA Amendments Act (ADAAA) in 2008.[345] Congress was clear that "the new law direct[ed] the courts toward a broader meaning and application of the ADA's definition of disability."[346]

Accordingly, an impairment will qualify as a disability protected by the ADA if it "substantially limits" a major life activity "as compared to most people in the general population."[347] "Major life activity" is defined as including a wide range of activities, like "caring for oneself[,] . . . sleeping, walking, standing, lifting, . . . learning, reading, concentrating, thinking, communicating, and working."[348] It also includes major bodily functions, including "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[349] An impairment need only substantially limit one life activity to be considered a disability.[350] Episodic disabilities also fall within the definition of "disability" when the impairment "would substantially limit a major life activity when active."[351] "Substantially limits" is not meant to be a demanding standard—the regulations specify that the impairment "need [not] prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting."[352]

To qualify for group home services, individuals must have an I/DD diagnosis.[353] I/DD refers to conditions "that are usually present at birth and that uniquely affect the trajectory of [an] individual's physical, intellectual, and/or emotional development."[354] An I/DD diagnosis is based

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from doing daily activities and that this impairment must be "permanent or long term"); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565–66 (1999) (holding that "mitigating measures must be taken into account in judging whether an individual possesses a disability" and that determination of disability must be made on an individual basis); Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 525 (1999) (holding that to be regarded as disabled, a person's impairment must "substantially limit" their ability to perform "major life activities"); Sutton v. United Air Lines, Inc., 527 U.S. 471, 487 (1999) (finding that the ADA does not cover people whose impairments can be corrected). All of these cases were superseded by the ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553 (codified in scattered sections of 29 and 42 U.S.C.).

345. See ADA Amendments Act § 2, 122 Stat. at 3553–54 (explicitly rejecting a narrow reading of disability espoused by the Supreme Court).

346. 154 Cong. Rec. 22232 (2008) (statement of Sen. Reid).

347. 28 C.F.R. § 35.108(d)(1)(v) (2023).

348. 42 U.S.C. § 12102(2)(A).

349. Id. § 12102(2)(B).

350. Id. § 12102(4)(C).

351. Id. § 12102(4)(D).

352. 28 C.F.R. § 35.108(d)(1)(v).

353. See AHCCCS Housing Programs, Ariz. Health Care Cost Containment Sys., https://www.azahcccs.gov/housing [https://perma.cc/9D2N-84UG] (last visited Jan. 4, 2024).

354. About Intellectual and Developmental Disabilities (IDDs), Eunice Kennedy Shriver Nat'l Inst. Child Health & Hum. Dev., https://www.nichd.nih.gov/health/topics/idds/conditioninfo [https://perma.cc/SF6B-HBGW] (last updated Nov. 9, 2021).

on a finding of "significant limitations in both intellectual functioning and adaptive behavior."[355] This means that a person with I/DD may have significant limitations in learning, reasoning and problem solving. Alternatively, "limitations in adaptive behavior" may mean that the person has difficulty with learning and exercising skills that people perform in their everyday lives. This includes language and literacy, interpersonal skills, and practical skills like toileting, dressing, and feeding oneself.[356] Some people may have co-occurring mental illnesses, or psychiatric disabilities, which are defined as conditions that affect a person's "emotion, thinking or behavior (or a combination of these)."[357] They include a wide range of conditions, including bipolar disorder, depression, eating disorders, schizoaffective disorders, and schizophrenia.[358]

I/DD can affect interpersonal skills, the ability to perform activities of daily living, and skills like language and literacy.[359] Psychiatric disabilities can also profoundly impact day-to-day living, including the ability to relate to or interact with others, bringing these conditions within the definition of "disability."[360] Using an interpretation of "substantially limits" that comports with the ADA's broad remedial purpose, a plaintiff with I/DD or a psychiatric disability will likely be able to demonstrate that their disability substantially limits one or more major life activities like learning, communicating, or caring for oneself.[361]

To be "qualified" under the ADA, an individual must show that they "meet[] the essential eligibility requirements for the receipt of services or the participation in programs or activities" provided by a public entity or

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355. Defining Criteria for Intellectual Disability, Am. Ass'n on Intell. & Developmental Disabilities, https://www.aaidd.org/intellectual-disability/definition [https://perma.cc/4LGG-HLJ6] (last visited Oct. 4, 2023).

356. Id.

357. See What Is Mental Illness?, Am. Psychiatric Ass'n, https://www.psychiatry.org/patients-families/what-is-mental-illness [https://perma.cc/VUR4-C4XK] (last updated Nov. 2022).

358. See id.

359. Defining Criteria for Intellectual Disability, supra note 355; see also Adams v. Crestwood Med. Ctr., 504 F. Supp. 3d 1263, 1291 (N.D. Ala. 2020) (stating that "[w]ithout ongoing support," people with intellectual and developmental disabilities will have "limit[ed] functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community" (internal quotation marks omitted) (quoting Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 33 (5th ed. 2013))); Clark v. California, 739 F. Supp. 2d 1168, 1185 (N.D. Cal. 2010) (finding that intellectual and developmental disabilities impact peoples' ability to engage in major life activities, including communication, socialization, and self-care).

360. See Joseph S. v. Hogan, 561 F. Supp. 2d 280, 293 (E.D.N.Y. 2008) (finding that plaintiffs had demonstrated that mentally ill people warehoused in nursing facilities were "disabled" within the meaning of the ADA).

361. See Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 605 (1999) (plurality opinion). For instance, both plaintiffs in *Olmstead* fell into this category. See supra note 172 and accompanying text.

a recipient of federal funds, with or without "reasonable modifications to rules, policies, or practices, the removal of . . . communication . . . barriers, . . . or the provision of auxiliary aids and services."[362] Assessing this will depend on the nature of the program or service and involves a fact-based inquiry about whether the plaintiff meets the public entity's eligibility criteria.[363] Courts have typically interpreted this requirement as imposing only a low bar on plaintiffs.[364]

To qualify under Arizona's EMD legislation, a person must demonstrate that they are "a bona fide resident of the state of Arizona" and "a person with a developmental disability."[365] Applicants must also need services provided in an institution like a nursing facility or intermediate care facility[366] and be Medicaid-eligible.[367] Demonstrating that people who already reside in Arizona group homes are qualified will not be difficult because they have already been found to be eligible for community-based services.[368]

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362. 42 U.S.C. § 12131(2) (2018). The ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." Id. § 121312; see also 28 C.F.R. § 41.32(b) (2023) (defining a "qualified handicapped person" as any disabled person who fulfills the "essential eligibility requirements" for a given service). The Rehabilitation Act uses similar language to prohibit discrimination by recipients of federal funds. See 29 U.S.C. § 794(a) (2018); see also supra note 341.

363. See, e.g., Castellano v. City of New York, 946 F. Supp. 249, 254 (S.D.N.Y. 1996) ("[Q]uestions of the reasonableness of an accommodation or the essentialness of an eligibility requirement generally need a fact-specific inquiry . . . .").

364. See, e.g., PGA Tour, Inc. v. Martin, 532 U.S. 661, 675 (2001) (interpreting the ADA as a "broad mandate"). A plaintiff need not meet all the formal legal eligibility requirements of a program to prove that they are "qualified." See Mary Jo C. v. N.Y. State & Loc. Ret. Sys., 707 F.3d 144, 156–57 (2d Cir. 2013). Rather, the question is whether the person meets all "essential" requirements. Id. A court will consider whether "[w]aiving an essential eligibility standard would constitute a fundamental alteration in the nature of the . . . program." Pottgen v. Mo. State High Sch. Activities Ass'n, 40 F.3d 926, 930 (8th Cir. 1994). Nor must the plaintiffs demonstrate that other placements in the community could not fully meet their needs. See, e.g., Williams v. Wasserman, 164 F. Supp. 2d 591, 630 (D. Md. 2001) (finding that "qualified individuals with disabilities" like plaintiffs did not need to show that existing community placements did not fully meet their needs (internal quotation marks omitted) (quoting 28 C.F.R. § 35.130(d) (2001))).

365. Ariz. Rev. Stat. Ann. § 36-559 (2023). The statute defines "developmental disability" as "a severe, chronic disability" that "[i]s attributable to a cognitive disability, cerebral palsy, epilepsy, Down syndrome or autism," "[i]s manifested before the age of eighteen," and "[i]s likely to continue indefinitely." Id. § 36-551(20). It defines "cognitive disability" as "a condition that involves subaverage general intellectual functioning[] [and] exists concurrently with deficits in adaptive behavior manifested before the age of eighteen." Id. § 36-551(15).

366. Id. § 36-2936(A).

367. Id. § 36-2901.07(A).

368. See id. § 36-551(25)(a) (defining a "group home" as "a community residential setting for . . . persons with developmental disabilities").

2. *Allocating Responsibility Under Federal Disability Law.* — The next question is whether the activity, service, or benefit is being provided by an entity covered by either Title II of the ADA or Section 504 of the Rehabilitation Act. Group home services in Arizona are provided by third-party service providers licensed by the Arizona Department of Health Services.[369] As such, the services they provide may not qualify as being provided by a "public entity," defined under Title II of the ADA as "any State or local government" or "any department, agency, special purpose district, or other instrumentality of a State or States or local government."[370]

Group home service providers do, however, receive federal financial aid and rely on Medicaid funding to administer their programs and activities.[371] Section 504 of the Rehabilitation Act is worded virtually identically to the ADA[372] but applies to programs that receive "[f]ederal financial assistance."[373] Section 504 of the Rehabilitation Act thus serves as

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369. Id. §§ 36-591(A), -132(A)(21); see also Contracted Group Homes, Ariz. Dep't of Econ. Sec., https://www.azahcccs.gov/shared/Downloads/HCBS/Appendix/12AppendixLGroupHomeFactSheet.pdf [https://perma.cc/EVE5-72XL] (last visited Jan. 4, 2024).

370. 42 U.S.C. § 12131(1)(A)–(B) (2018). The regulations are clear that "[t]he programs or activities of entities that are licensed or certified by a public entity are not" covered by Title II. 28 C.F.R. § 35.130(b)(6) (2023); see also Noel v. N.Y.C. Taxi & Limousine Comm'n, 687 F.3d 63, 70 (2d Cir. 2012) ("[E]ven if private industry . . . fails to provide meaningful access for persons with disabilities, a licensing entity . . . is not therefore in violation of Title II(A), unless the private industry practice results from the licensing requirements.").

371. See Peter Valencia, Arizona Targets Phony Group Homes, Accused of Defrauding Millions From Medicaid System, Ariz.'s Fam. (May 16, 2023), https://www.azfamily.com/2023/05/16/arizona-targets-phony-group-homes-accused-defrauding-millions-medicaid-system/ [https://perma.cc/U648-QD7F] (reporting that fraudsters exploited group home providers' receipt of Medicaid funding). Arizona Home and Community Based Services (HCBS), including group homes, are subsidized by Medicaid funds from the Arizona Health Care Cost Containment System (AHCCCS), a statewide managed-care program established under a Section 1115 Research and Demonstration Waiver. Ariz. Health Care Cost Containment Sys., Arizona's Section 1115 Waiver Demonstration Annual Report 3–4 (2022), https://azahcccs.gov/Resources/Downloads/FY2022AnnualReportCMS.pdf [https://perma.cc/E997-JVH3].

372. See Henrietta D. v. Bloomberg, 331 F.3d 261, 272 (2d Cir. 2003) (holding that while there are subtle differences between Title II of the ADA and Section 504, "unless one of those subtle distinctions is pertinent to a particular case, we treat claims under the two statutes identically"); see also 28 C.F.R. § 41.51(b)(3)(i) (stating that a "recipient may not . . . utilize criteria or methods of administration[] . . . [t]hat have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap"); id. § 41.51(d) ("Recipients shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.").

373. 29 U.S.C. § 794(b)(3)(A) (2018). Under Section 504, a "program or activity" includes "an entire corporation, partnership, or other private organization . . . which is principally engaged in the business of providing education, health care, housing," or "social services." Id.

a mechanism to challenge discriminatory conduct by group homes not operated by state or local governments.[374]

Arguably, however, that violation of the integration mandate arises from criteria set out by the state itself. Arizona group home service providers are, after all, bound by (1) statutes governing the operation of group homes and (2) the regulations issued by the director of the Department of Economic Security.[375] A public entity might violate the ADA's integration mandate when, "through its planning, service system design, funding choices or service implementation practices, [it] promotes or relies upon the segregation of individuals with disabilities in private facilities or programs."[376] States have been found to have violated the integration mandate when they have developed statutory and regulatory frameworks that have resulted in the segregation of people with disabilities.[377] Accordingly, the State could be held liable for restrictive measures taken by private entities.

3. *The Overly Restrictive Impact of Electronic Monitoring Devices.* — The use of EMDs prevents group home residents from accessing services in the "most integrated setting" appropriate to their needs. Specifically, as expounded further below, the use of EMDs profoundly and adversely impacts residents' privacy. This has flow-on effects that hurt group home residents' ability to have meaningful and intimate relationships with family members, staff, and nondisabled community members.

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374. Courts have held that Medicaid reimbursements qualify as "[f]ederal financial assistance." See, e.g., Wagner ex rel. Wagner v. Fair Acres Geriatric Ctr., 49 F.3d 1002, 1010 (3d Cir. 1995) ("The legislative history of section 504 indicates that Congress clearly contemplated that section 504 would apply to nursing homes that receive federal funding."); Mitchell ex rel. Mitchell v. Cmty. Mental Health of Cent. Mich., 243 F. Supp. 3d 822, 842 (E.D. Mich. 2017) (concluding that the plaintiffs had viable Rehabilitation Act claims because Medicaid reimbursements are a form of federal financial assistance).

375. Ariz. Rev. Stat. Ann. §§ 36-568(C), -551(20) (2023).

376. DOJ *Olmstead* Statement, supra note 196; see also 28 C.F.R. § 35.130(b)(1) (prohibiting a public entity from discriminating "directly or through contractual, licensing, or other arrangements, on the basis of disability"); id. § 35.130(b)(3) (prohibiting a public entity from "directly or through contractual or other arrangements[] utiliz[ing] criteria or methods of administration" that "have the effect of . . . discriminat[ing] on the basis of disability").

377. See, e.g., Conn. Off. of Prot. & Advoc. for Persons With Disabilities v. Connecticut, 706 F. Supp. 2d 266, 277 (D. Conn. 2010) (holding that Connecticut could not avoid its legal obligations even though "its consumers resided in privately-run facilities" and that "the actions of the state that led to a denial of integrated settings could serve as the basis for an ADA claim"); see also Disability Advocs., Inc. v. Paterson, 598 F. Supp. 2d 289, 317–18 (E.D.N.Y. 2009) ("The statutory and regulatory framework governing the administration, funding, and oversight of New York's mental health services . . . involves 'administration' on the part of [state-government defendants]."), vacated on other grounds sub nom. Disability Advocs., Inc. v. N.Y. Coal. for Quality Assisted Living, Inc., 675 F.3d 149 (2d Cir. 2012).

Privacy is one of the key differences between integrated and nonintegrated settings.[378] The Home and Community Based Services (HCBS) Settings Rule, issued by CMS in 2014, was drafted due to concerns that group homes were imposing restrictions on residents that were reminiscent of institutional settings, isolating and segregating people with disabilities from the broader community.[379] To correct this trajectory, the HCBS Settings Rule emphasizes that community-based settings must ensure a person's right to "privacy, dignity, respect, and freedom from coercion and restraint."[380] DOJ guidance also provides that to be integrated, settings must do more than merely assure that disabled people can interact with people without disabilities. Rather, residents must be able to enjoy "those aspects of life that all persons enjoy, including privacy, autonomy, the ability to exercise choice and opportunities to engage in activities alongside others in the community."[381] By contrast, segregated settings "often have the qualities of an institutional nature," including "congregate settings characterized by regimentation in daily activities" and "lack of privacy or autonomy."[382]

Both the DOJ guidance and the HCBS Settings Rule specifically identify residents' privacy as something to be protected to the maximum extent possible. Infringements on privacy should be permitted only when necessary to meet a person's individually assessed needs.[383] Arizona's legislation, however, risks creating spaces in which people are completely deprived of privacy. The legislation permits EMDs to be used and installed in any room, "designed for use by multiple individuals, including residents."[384] Beyond this constraint, the statute and its implementing regulations can be widely interpreted to include all communal living and working spaces. These privacy violations are exacerbated when a resident's

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378. HCBS Settings Rule, 79 Fed. Reg. 2948, 3012 (Jan. 16, 2014) ("We are including language in the final rule that focuses on the critical role of person-centered planning and addresses fundamental protections regarding freedom, dignity, control, daily routines, privacy and community integration."); see also 42 C.F.R. § 441.301(c)(4) (2022).

379. ACLU, The Home and Community Based Services Setting Rule Frequently Asked Questions 1 (2018), https://www.aclu.org/wp-content/uploads/legal-documents/aclu_faq_-_hcbs_settings_rule-final-_1-10-18.pdf [https://perma.cc/7X2U-NTN6] (noting that the HCBS Settings Rule is a "complement to the [ADA]" developed to address "concerns that many states and providers were using federal dollars dedicated to community-based supports to pay for [institutional] disability services" and to remedy this situation by "articulating . . . minimum requirements for HCBS funding").

380. Id. at 2.

381. Chin, supra note 36, at 428; see DOJ *Olmstead* Statement, supra note 196.

382. DOJ *Olmstead* Statement, supra note 196.

383. HCBS Settings Rule, 79 Fed. Reg. at 2966 ("[A] person's ability to receive services identified in the person-centered service plan should not be infringed upon . . . . [A]ny setting not adhering to the regulatory requirements will not be considered home and community-based. The supports necessary to achieve an individual's goals must be reflected in the person-centered service plan [per] [42 C.F.R.] § 441.725(b)(5).").

384. Ariz. Dep't of Econ. Sec., Electronic Monitoring, supra note 227, at 1.

responsible person requests and pays for the monitoring device to be installed in the resident's bedroom.[385] Accordingly, residents will have limited opportunity to avoid monitoring devices, even in extremely private spaces like bedrooms.

Other than the infringement on privacy, the use of EMDs could also have a chilling effect on relationships between residents in the group home and between residents and staff. The use of EMDs in group homes could erode relationships between direct-service providers and the people in the house. They may inhibit nonabusive behaviors that are an essential part of developing intimate relationships but could be perceived as being problematic, like having sensitive conversations with staff members.[386] Workers subject to monitoring in nursing home facilities report being worried how "being made to work on camera would communicate mistrust, have a chilling effect on care relationships, and contribute to the problem of low-quality jobs and poor retention."[387] Other disability scholars have argued that EMDs will permit staff to use the cameras to monitor people and forgo personal contact.[388]

The social model of disability encapsulated by the ADA and Section 504 requires specified entities to adjust their policies to create "access and opportunity" for people with disabilities.[389] Overprotective policies that prevent human connection and intimacy for people with disabilities fall foul of this requirement.[390] The lack of privacy caused by EMDs, particularly in bedrooms, can affect group home residents' ability to engage in intimate and sexual relationships. Further, the lack of privacy may also deter group home residents from having guests or visitors.[391]

In *Olmstead*, the Supreme Court deferred to Title II regulations issued by the Attorney General that "define[] 'the most integrated setting appropriate to the needs of qualified individuals with disabilities' to mean 'a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.'"[392] Courts have repeatedly found that isolating people with disabilities in settings where they cannot have meaningful interactions with nondisabled people violates the

385. Id. at 4.

386. See Levy et al., supra note 218, at 356 ("Because visitors are likely to be only occasionally present within resident rooms, they may have less familiarity with monitoring regimes than other parties (workers, roommates, or residents)—and have less ability to consent to or place conditions upon being monitored while in the room.").

387. Id. at 334.

388. See Ho et al., supra note 249, at 359.

389. Chin, supra note 36, at 407.

390. Id.

391. Levy et al., supra note 218, at 356 (noting the potential for this kind of isolation in nursing facilities with EMDs).

392. Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 592 (1999) (quoting 28 C.F.R. pt. 35, app. A (1998)).

integration mandate.[393] So, for instance, in *Lane v. Kitzhaber*, a federal district court in Oregon found that plaintiffs had stated a sufficient claim under the integration mandate because the sheltered workshops at issue, which afforded limited opportunities for people with disabilities to interact with other workers, did not permit interaction with nondisabled people to the fullest extent possible.[394] In *Guggenberger v. Minnesota*, a federal district court in Minnesota found that plaintiffs had adequately pled that they were suffering from unjustified isolation.[395] In making this determination, the court considered how plaintiffs experienced "disconnectedness from the community" and could not interact with "peers with disabilities and without disabilities."[396] The social isolation that EMDs would cause group home residents with disabilities is precisely the kind of situation the integration mandate seeks to prevent.

4. *Less Restrictive Safety Measures.* — This Essay argues that states should consider modifications that bolster the oversight and accountability of group homes but would not fundamentally alter the state's services. Once it is established that a state has engaged in a form of disability-based discrimination by isolating group home residents using EMD, the next step is to consider whether any proposed modification is reasonable or would fundamentally alter the nature of the state's programs or activities.[397] These measures include increasing the pressure on service providers to report on incidents of abuse and neglect,[398] mandating the prompt and thorough investigation of these incidents,[399] increasing state

393. See, e.g., Joseph S. v. Hogan, 561 F. Supp. 2d 280, 292 (E.D.N.Y. 2008) (finding that the restrictive nature of nursing facilities, including restrictions on movement and limited access to the community, prevented nursing home residents from interacting with "nondisabled persons to the fullest extent possible" (internal quotation marks omitted) (quoting 35 C.F.R. pt. 35, app. A at 450)).

394. 841 F. Supp. 2d 1199, 1206 (D. Or. 2012).

395. See 198 F. Supp. 3d 973, 1029 (D. Minn. 2016).

396. Id.

397. See 28 C.F.R. § 35.130(b)(7) (2023) (describing public entities' obligations to make reasonable modifications to avoid disability-based discrimination).

398. See HHS, Joint Report: Group Homes, supra note 214, app. A at A-iii (recommending that service providers "ensure that all incidents are reported as soon as possible after discovery"). These recommendations are drawn from model practices in a Joint Report issued by three HHS divisions: the HHS Office of Inspector General, the Administration for Community Living, and the HHS Office for Civil Rights. The report includes four compliance oversight components: "1. reliable incident management and investigation processes; 2. audit protocols that ensure compliance with reporting, review, and response requirements; 3. effective mortality reviews of unexpected deaths; and 4. quality assurance mechanisms that ensure the delivery and fiscal integrity of appropriate community-based services." Id. at 13–14. Together, these components "help ensure that beneficiary health, safety, and civil rights are adequately protected, that provider and service agencies operate under appropriate accountability mechanisms, and that public services are delivered consistent with funding expectations and commitments." Id. at 14.

399. Id. app. A at A-viii to A-ix (recommending that most investigations be completed within thirty days and that investigations review (1) surrounding circumstances;

oversight of group home services,[400] and ensuring that group home residents receive individualized services to prevent the risk of abuse and revictimization.[401]

There are significant problems with Arizona's abuse and neglect investigation and oversight processes.[402] In 2019, Governor Douglas A. Ducey issued Arizona Executive Order 2019-03, calling for relevant state agencies to convene the Abuse and Neglect Prevention Taskforce, a working group to recommend measures to protect and improve care for people with disabilities.[403] The Task Force recommended that state agencies develop policies pertaining to "preventing abuse, neglect, and exploitation, reporting incidents, conducting investigations, and ensuring incident stabilization and recovery."[404] In 2022, Arizona Health Care Cost Containment System (AHCCCS), one of the state agencies with the authority to conduct abuse and neglect investigations on behalf of people with disabilities, had only made partial progress toward creating these protocols.[405]

In 2023, an audit of the Arizona Department of Economic Security's Adult Protective Services (APS), another agency responsible for protecting

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(2) interviews with witnesses to the incident, family, and the provider agency; and (3) any reports from the State protection and advocacy agency pertaining to group home incident investigations).

400. Id. app. A at A-x to A-xi (recommending that the state conduct a "trend analysis of incidents," "identify the specific incident types that would benefit from a systemic intervention," and "ensure ongoing monitoring of the implementation of accepted recommended corrective actions"); see also id. app. B at B-i to B-xiii (outlining guidelines for states to carry out regular incident management audits to ensure compliance with incident reporting and timely completion of investigations by group home service providers).

401. Id. app. D at D-viii (emphasizing the need for "[p]erson-centered quality reviews" to ensure that the individual was provided with services "in the amount, frequency, duration, and scope required").

402. See, e.g., Amy Silverman, Unsafe Abuse and Neglect of Arizona's Most Vulnerable Can Happen Anywhere, KJZZ (Dec. 2, 2022), https://kjzz.org/content/1827172/unsafe-abuse-and-neglect-arizonas-most-vulnerable-can-happen-anywhere [https://perma.cc/W6NF-PBUF] (noting that Arizona's Division of Developmental Disabilities received over 10,000 incident reports in 2019 and 2020, many of which were never resolved).

403. Ariz. Health Care Cost Containment Sys., Report of the Abuse & Neglect Prevention Task Force to Governor Douglas A. Ducey 4, 7 (2019), https://www.azahcccs.gov/AHCCCS/Downloads/AbuseAndNeglectPreventionTaskForceReport2019.pdf [https://perma.cc/EM8C-HEKQ].

404. Id. at 8.

405. Univ. of Ariz. Sonoran Ctr. for Excellence in Disabilities, Implementation and Impact of Arizona's Abuse & Neglect Prevention Task Force Recommendations 13, 26 (2022), https://www.azahcccs.gov/AHCCCS/Downloads/AbuseAndNeglectPrevention_TF_Recommendations-SonoranUCEDD.pdf [https://perma.cc/XJU3-GXWQ] (noting that AHCCCS had made limited progress in identifying, tracking, and analyzing incidents, which would "require significant structural and systems change across Arizona agencies," though progress toward "boost[ing] accountability of vendors and services for the protection of vulnerable individuals" had been achieved).

"vulnerable adults" in the state,[406] revealed that problems with investigation and monitoring processes persisted.[407] Investigations carried out by APS resulted in substantiation[408] less than one percent of the time—a rate "far lower than the national average."[409] Stakeholders raised concerns about the quality of investigations carried out,[410] and the report noted that the investigative timeframe was longer than the national average.[411] The audit report concluded that the system lacked an adequate mechanism to track incidents of abuse and neglect.[412] It recommended that the state develop protocols for providing case management services to ensure that vulnerable adults received the support and services they required to prevent revictimization.[413]

Overhauling Arizona's processes could be framed not as a fundamental alteration of the state's services but as part and parcel of its obligations to secure federal Medicaid funding.[414] To receive Medicaid funds, states must provide "satisfactory assurances" to CMS that they have engaged in the "necessary safeguards" to "protect the health and welfare of the beneficiaries" of services under any waiver.[415] As part of annual reporting requirements, CMS requires that states develop systems to "prevent, detect, and remediate critical incidents,"[416] or incidents that are likely to cause harm to beneficiaries, and define standards for service

406. Ariz. Rev. Stat. Ann. § 46-451 (2023) (defining a "vulnerable adult" as an individual "who is eighteen years of age or older and who is unable to protect himself from abuse, neglect or exploitation by others because of a physical or mental impairment" or whom a court has deemed an "incapacitated person"); see also id. § 14-5101 (defining "incapacitated person" as someone "impaired by reason of mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person").

407. LeCroy & Milligan Assocs., Inc., Examining the Delivery of Services to Vulnerable Adults in the Arizona Adult Protective Services System 3 (2023), https://www.azauditor.gov/sites/default/files/23-114_Report.pdf [https://perma.cc/4LN9-44B2] (finding that Arizona's APS system lacked a "strategic direction" for "ensuring vulnerable adults are protected from abuse, neglect, and exploitation and receive the services they need" and that it lacked a case management process for evaluating its efficacy).

408. Id. at 8, 50 ("Substantiated decisions indicate the APS investigation found supporting evidence that the alleged allegations of abuse, neglect, or maltreatment occurred and result in the perpetrator being placed on the Arizona APS Registry.").

409. Id. at 7.

410. Id. at 52.

411. Id. at 8.

412. Id. at 34 ("This review found that the DES APS data system is not set up to track and measure service outcomes for vulnerable adults. . . . Service outcome information is critical to identifying ways to improve the delivery of services.").

413. Id. at 31–32.

414. See 42 C.F.R. § 441.302(a) (2022) (listing requirements that Medicaid beneficiaries must meet).

415. Id. § 441.302.

416. Id. § 438.330(b)(5)(ii).

providers to meet to protect the welfare of enrollees in any home and community-based services.[417] While states have broad discretion to design these systems, they must report on the processes they have in place to "[i]dentify[] and respond[] to alleged instances of abuse, neglect and exploitation" and "[i]nstitut[e] appropriate safeguards concerning practices that may cause harm to the participant or restrict participant rights."[418] Creating robust investigative and case-monitoring processes is therefore already part of the state's responsibilities.

B. *Electronic Visit Verification (EVV) Subjects: "Qualified Individuals With Disabilities"*

This section of the Essay analyzes the EVV system used in Arkansas, which is perhaps one of the country's most burdensome.[419] Arkansas is one of a handful of states that has incorporated geofencing, GPS tracking, and biometric identification as part of its EVV system.[420]

1. *People Subject to EVV: "Qualified Individuals With Disabilities".* — To qualify for protection under the ADA, people subject to EVV requirements will need to demonstrate that they have an impairment that "substantially limits one or more major life activities."[421] PCS recipients may have a range of disabilities—from physical disabilities to intellectual and developmental disabilities—that impact their independence and ability to perform their activities of daily living.[422] They may require assistance with performing

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417. Id. § 441.730(a).

418. Ctrs. for Medicare & Medicaid Servs., Application for a § 1915(c) Home and Community-Based Waiver: Instructions, Technical Guide and Review Criteria 8 (2019), https://wms-mmdl.cms.gov/WMS/help/35/Instructions_TechnicalGuide_V3.6.pdf [https://perma.cc/J2SX-QC24].

419. See, e.g., Eubanks & Mateescu, supra note 289 (finding that Arkansas's system—which did not include self-directed clients or live-in caregivers in pilot testing—to be burdensome, difficult to use, and unduly punitive).

420. See Ariana Aboulafia & Henry Claypool, The Vast Surveillance Network that Traps Thousands of Disabled Medicaid Recipients, Slate (July 26, 2023), https://slate.com/technology/2023/07/ada-anniversary-disability-electronic-visit-verification.html [https://perma.cc/48CA-A7FK] ("[O]ther outlets have reported on disabled people who have been forced to share photographs and biometric data with third-party apps if they want to continue receiving government support to pay for their in-home care."); EVV Frequently Asked Questions for Providers, Ark. Dep't of Hum. Servs., https://humanservices.arkansas.gov/divisions-shared-services/medical-services/evv-info/evv-provider-faq/ [https://perma.cc/9Z29-GN2G] (last visited Oct. 4, 2023) ("[W]hen the caregiver clocks in/out outside of the geo fence (more than 1/8 of a mile) from the client's residence, the system will flag the clock in/out location as out of geo-fence critical exception.").

421. 42 U.S.C. § 12102(1) (2018) (defining "disability" for purposes of ADA coverage).

422. CMS defines "personal care services" as "a range of human assistance provided to persons with disabilities and chronic conditions"—a broad category of service recipients with various disabilities. See Ctrs. for Medicare & Medicaid Servs., Preventing Medicaid Improper Payments for Personal Care Services 4 (2017), https://www.cms.gov/medicare-medicaid-coordination/fraud-prevention/medicaid-integrity-education/downloads/pcs-

those activities, including "eating, bathing, dressing, ambulation, and transfers from one position to another."[423] They may also require assistance with "instrumental activities of daily living"—tasks that assist people with living independently, including "meal preparation, hygiene, light housework, and shopping for food and clothing."[424] These are all activities that are necessary for caring for oneself—a specifically delineated "major life activity" under the ADAAA.[425]

Personal care services are provided to Medicaid recipients to "help them . . . stay in their own homes and communities rather than live in institutional settings, such as nursing facilities."[426] In other words, recipients have disabilities significant enough that they may be institutionalized if they do not receive these services. Plaintiffs requiring PCS will likely qualify as having impairments that substantially limit a major life activity.

To qualify for PCS in Arkansas, people must meet eligibility requirements for different state-developed programs depending on age and disability.[427] Plaintiffs impacted by EVV systems would have already been assessed as being eligible for PCS under each of these programs.

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prevent-improperpayment-booklet.pdf [https://perma.cc/8MVZ-3SLZ] [hereinafter CMS, Preventing Improper Payments].

423. Id.

424. Id.

425. See 42 U.S.C. § 12102(2)(A) ("[M]ajor life activities include, but are not limited to, *caring for oneself*, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." (emphasis added)).

426. CMS, Preventing Improper Payments, supra note 422, at 3; see also Adams & Katz, supra note 1, at 63–64.

427. For an applicant to qualify for Medicaid-funded PCS in Arkansas, a doctor must find it necessary for the person to be served in their home, as long as that residence is not a nursing facility or intermediate care facility. See Arkansas Medicaid Personal Care: Eligibility and Benefits, Paying for Senior Care, https://www.payingforseniorcare.com/arkansas/medicaid-waivers/personal-care [https://perma.cc/Z73Q-6EJK] (last updated Jan. 4, 2023). People seeking these services must also meet certain financial requirements, including income and asset limits. Id. Personal care services for people with I/DD are available under the Community and Employment Support (CES) Waiver. CES Waiver, Ark. Dep't of Hum. Servs., https://humanservices.arkansas.gov/divisions-shared-services/developmental-disabilities-services/ces-waiver/ [https://perma.cc/6CPZ-MRXC] (last visited Jan. 5, 2024). To qualify for waiver services, applicants must show that they have a diagnosis of I/DD that is expected to continue indefinitely and that they meet level-of-care requirements demonstrating substantial support needs in at least three of the following categories: "self-care, understanding and use of language, learning, mobility, self-direction, or ability to live independently." Id. Attendant care services, which include in-home assistance with Activities of Daily Living (ADL) (activities like bathing, toileting, and eating) and Instrumental Activities of Daily Living (IADL) (more complex activities like managing finances and medication), for people with physical disabilities aged twenty-one and above are provided under the AR Choices program. AR Choices in Home Care, Favor Home Care, https://www.favorcare.com/archoices-home-care [https://perma.cc/Y8JC-NSD4] (last visited Oct. 4, 2023); Activities of Daily Living Checklist and Assessments,

2. *EVV Systems Offered by a "Public Entity".* — Personal care services are programs provided by a public entity within the meaning of the ADA and the Rehabilitation Act.[428] The Supreme Court has unequivocally determined that Title II covers all programs, services, and activities of governmental entities "without any exception."[429]

Arkansas uses an open vendor EVV model whereby the state selects an EVV vendor that provides services to agencies with no cost.[430] The vendor chosen by the state, Fiserv, offers a system called AuthentiCare, which involves a mobile application and an Interactive Voice Response system to record caregiver visits to clients and report on service provision in real time.[431] Given that the state directly funds the use of the AuthentiCare

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Paying for Senior Care, https://www.payingforseniorcare.com/activities-of-daily-living [https://perma.cc/9VQB-4345] (last updated Apr. 20, 2021). To qualify for this program, the applicant must be assessed as requiring a "nursing home level of care and require a minimum of one of the services offered through AR Choices," which includes home modifications, adult day care, respite care, and assistance with ADLs or IADLs. AR Choices in Homecare Medicaid Waiver (Arkansas), Paying for Senior Care, https://www.payingforseniorcare.com/arkansas/medicaid-waivers/choices-homecare [https://perma.cc/9DWZ-5M2M] (last updated Jan. 8, 2023). They must also satisfy certain income and asset limits. Id.

428. The ADA prohibits disability-based discrimination in "services, programs, [and] activities of . . . public entit[ies]." 42 U.S.C. § 12132. The Rehabilitation Act prohibits such discrimination in "any program or activity receiving Federal financial assistance" and broadly defines "program or activity" to include "all of the operations of" a qualifying local government. 29 U.S.C. § 794(a),(b) (2018).

429. Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 209–10 (1998) (emphasis omitted) (noting that the ADA covers all state activities, including the administration of state prisons, and includes "services" provided involuntarily to prisoners and pretrial detainees); see also Haberle v. Troxell, 885 F.3d 170, 184 (3d Cir. 2018) (Greenaway, J., concurring) ("Section 504 of the Rehabilitation Act defines 'program or activity' to mean '*all* of the operations' of an entity . . . and . . . '[t]he statutory definition of "[p]rogram or activity" in Section 504 indicates that the terms were intended to be *all-encompassing*.'" (first and second quotations quoting 29 U.S.C. § 794(b); third quotation quoting Yeskey v. Pa. Dep't of Corr., 118 F.3d 168, 170 (3d Cir. 1997))).

430. Electronic Visit Verification (EVV) Information, Ark. Dep't of Hum. Servs., https://humanservices.arkansas.gov/divisions-shared-services/medical-services/evv-info/ [https://perma.cc/9U8D-G6KK] (last visited Jan. 19, 2024). Not all states use the "open" model to provide EVV services. Other models include the Provider Choice Model (in which the providers select and self-fund EVV implementation), the Managed Care Organization Choice Model (in which managed care organizations select and self-fund their EVV vendor solution), the State Mandated In-House Model (in which the state develops, operates, and manages its own EVV system), and the State Mandated External Vendor Model (in which states contract with a single EVV vendor to implement a single solution). Jen Burnett & Camille Dobson, Medicaid in a Time of Change: Electronic Visit Verification 12–15 (2018), https://www.healthmanagement.com/wp-content/uploads/EVV-Webinar-HMAIS-05-24-18.pptx (on file with the *Columbia Law Review*).

431. See EVV Frequently Asked Questions for Providers, supra note 420 (discussing the features and requirements for Arkansas's preferred EVV solution, Fiserv's AuthentiCare).

system and has specified how the system must operate, the system will likely be deemed a "service, program, or activity" provided by a public entity.[432]

Arkansas also permits third-party service providers to choose their own vendor as long as they comply with the state's requirements.[433] As with AuthentiCare, any EVV system chosen by a vendor must permit checking in and out using Interactive Voice Response landlines and set the geofence at one-eighth mile.[434] In *Disability Advocates, Inc. v. Paterson*, the State of New York argued that no state "service, program, or activity" could be identified when the adult homes were privately operated and the state's only involvement was in licensing those facilities.[435] The court correctly observed that the plaintiffs were challenging the state's "choice to plan and administer its mental health services in a manner that results in thousands of individuals with mental illness living and receiving services in allegedly segregated settings."[436] In the context of EVV in Arkansas, the state has set out the regulatory framework that service providers must comply with. Accordingly, even though third-party service providers may use their own vendors, the plaintiffs would be challenging the state's plan in administering and providing EVV services.

3. *Arkansas's EVV System Isolates and Segregates.* — Federal courts have recognized that segregation and isolation that results from the way home and community-based services are provided can violate the integration mandate. In *Steimel v. Wernert*, the plaintiffs alleged that their move from one waiver to another "dramatically curtailed" their ability to participate in the community by drastically cutting their number of hours of community time per week.[437] The Seventh Circuit recognized that "[i]solation in a home can just as 'severely diminish[] the everyday life activities' of people with disabilities"[438] and held that state policies that segregate people within their homes violate the integration mandate.[439]

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432. See, e.g., Frame v. City of Arlington, 657 F.3d 215, 227 (5th Cir. 2011) (arguing that programs and activities of a public entity include all of its "operations," defined as "the whole process of planning for and operating a business or other organized unit" (internal quotation marks omitted) (quoting Operations, Webster's Third New International Dictionary (1993))). Arkansas's choice of EVV system could arguably be part of the process of planning and operating that goes into administering Medicaid-subsidized PCS.

433. See EVV Frequently Asked Questions for Providers, supra note 420 ("You can choose to use a different EVV vendor, but at your expense. If you do this, it is critical that your chosen vendor integrates with the State's vendor, Fiserv. . . . Your vendor will be required to send the EVV data the State needs to verify visits and validate[] claims.").

434. See id.

435. 598 F. Supp. 2d 289, 293, 313 (E.D.N.Y. 2009) (internal quotation marks omitted) (quoting 28 C.F.R. § 35.130(b)(7) (2009)), vacated on other grounds sub nom. Disability Advocs., Inc. v. N.Y. Coal. for Quality Assisted Living, Inc., 675 F.3d 149 (2d Cir. 2012).

436. Id. at 318.

437. 823 F.3d 902, 908 (7th Cir. 2016).

438. See id. at 910–11 (second alteration in original) (quoting Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 602 (1999)).

439. See id. at 910–14.

Similarly, in *Guggenberger*, the plaintiffs resided in their own homes rather than in institutions.[440] But the court found that they were not "living, working, and receiving services" in the most integrated setting because the state's administration of the waiver services program kept them from participating fully within the community.[441] The court held that failing to provide supports and services to increase the plaintiffs' ability to participate in community life violated the integration mandate.[442]

The isolation experienced by people subject to Arkansas's EVV system is analogous to the experience of the plaintiffs in both *Steimel* and *Guggenberger*. Arkansas's use of geofencing and GPS isolates people within their own homes, violating the integration mandate. Although EVV systems must be "minimally burdensome," users find them extremely disruptive to services.[443] Significantly, EVV systems "create[] an atmosphere of ambient criminalization."[444] States' use of geofencing as part of their EVV systems exacerbates this feeling. If a caregiver clocks in or out outside of the geofence from the client's residence, the system flags it as an "'unauthorized location' error."[445] The PCS provider must then explain why the worker was outside of the allowed geofence zone.[446] As a result, many users report feeling imprisoned in their homes, worried about having their movements flagged as fraudulent.[447] This is borne out by a survey of home care recipients conducted by the National Council on Independent Living across thirty-six states in 2020, which found that "[o]ne-third of respondents stay at home more often than prior to EVV use, due to fear that geofencing limitations will flag a visit as fraud or cause delay in or loss of provider wages."[448]

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440. Guggenberger v. Minnesota, 198 F. Supp. 3d 973, 987 (D. Minn. 2016).

441. Id. at 1029–30.

442. Id. at 1029.

443. Mateescu, supra note 37, at 2 (internal quotation marks omitted) (quoting Ctrs. for Medicare & Medicaid Servs., CMCS Informational Bulletin: Electronic Visit Verification 2 (2018), https://www.medicaid.gov/federal-policy-guidance/downloads/cib051618.pdf [https://perma.cc/9JJL-UHG8]).

444. Id. at 39.

445. Id. at 41 (quoting Eubanks & Mateescu, supra note 289).

446. Id.

447. DREDF Opposes Electronic Visit Verification (EVV) When It Threatens Disabled People's Civil and Privacy Rights and Impedes Personal Choice, Autonomy, and Community Participation, Disability Rts. & Educ. Def. Fund (Mar. 2018), https://dredf.org/2018/03/07/dredf-statement-on-electronic-visit-verification/ [https://perma.cc/9YD4-7PMM] ("EVV typically requires workers to check in from the homes of clients, yet consumer directed attendant programs allow services to be delivered anywhere they are needed . . . . This conflict creates the potential for an atmosphere of 'house arrest' . . . .").

448. Call to Action: The Need for Federal Protections in Electronic Visit Verification, Nat'l Council on Indep. Living, https://secureservercdn.net/198.71.233.129/bzd.3bc.myftpupload.com/wp-content/uploads/2020/08/8-2-20-CALL-TO-ACTION.pdf [https://perma.cc/P4S8-FLW7] (last visited Oct. 6, 2023); see also Mateescu, supra note 37, at 39 (arguing that "GPS tracking and geofencing features pressure service recipients and their

Further, federal courts have found that the integration mandate has been violated when the administration of waiver services results in "current or future gaps in services," putting plaintiffs at "risk of institutionalization."[449] In *Waskul v. Washtenaw County Community Mental Health*, the State of Michigan had amended the methodology it used to determine the amount that people could pay home or community-based care staff.[450] Because of the change in methodology, the plaintiffs could not afford providers and so had to "pay for supports and services themselves [or] hire family members at below-market rates."[451] As a result, they alleged that their conditions deteriorated, placing them at risk of institutionalization.[452] The Sixth Circuit held that the plaintiffs stated a claim for an integration mandate violation by showing that they were at serious risk of institutionalization because they could not sustain care within the community.[453]

Along those lines, EVV systems violate the integration mandate by making it unsustainable for people to participate in community-based services. First, EVV systems are costly. Their costs are borne predominantly by poorly paid workers and the people they serve.[454] The requirement to adopt EVV systems presumes that personal care workers can readily access an active data plan, a functioning home internet connection, and an installed landline for workers to call in and out.[455] Disabled people and their staff report that the costs of paying for EVV services can "mean the difference between having enough to eat or going hungry at the end of the month."[456]

Second, EVV systems are punitive and threaten a workforce that is necessary to keep people with disabilities living in the community. Glitches in the system can mean that care providers may not be paid for their work due to inaccuracy in recording hours and services.[457] The pay is frequently notoriously low, and lost wages and delayed paychecks have significant consequences for a population that struggles to buy groceries or pay rent.[458] Some users report having to supplement workers' salaries from their own limited funds to ensure that their personal care providers can

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workers to re-orient their lives—including their movements, living arrangements, and routines—to conform with compliance rules").

449. See, e.g., Steimel v. Wernert, 823 F.3d 902, 917 (7th Cir. 2016) (finding that such gaps can violate the integration mandate).

450. 979 F.3d 426, 438 (6th Cir. 2020).

451. Id. at 439.

452. Id.

453. Id. at 465–66.

454. Mateescu, supra note 37, at 39.

455. Id. at 49.

456. Task Force Statement of Principles and Goals, supra note 286, at 3 (emphasis omitted).

457. Mateescu, supra note 37, at 36.

458. Eubanks & Mateescu, supra note 289.

continue to work with them.[459] Across the nation, there is a severe and profound shortage of qualified personal care service providers.[460] This is especially true in states like Arkansas.[461] As this workforce diminishes, people may find it difficult to access home-based services, ultimately resulting in hospitalization or institutionalization in long-term care facilities.[462] Without these services, people who require home health aide assistance risk being institutionalized—a cognizable claim under the integration mandate.

4. *Using Less Intrusive EVV Surveillance Systems: Not a Fundamental Alteration.* — While states must make reasonable modifications to their policies, they may refuse to fundamentally alter programs or services.[463] Arkansas's EVV system has cost the state $5.7 million,[464] and dismantling it may also be a costly enterprise.[465] The Supreme Court in *Olmstead* recognized that states' budgetary constraints are relevant and can be considered as part of the overall fundamental alteration calculus.[466] Accordingly, the state may argue that overhauling EVV systems to remove their more invasive aspects would fundamentally alter the nature of the service, program, or activity being offered.[467]

The state cannot, however, simply rely on the argument that amending EVV systems to make them less intrusive would cost too much.[468] To succeed on such a claim, the state would have to demonstrate that, under the allocation of available resources, immediate relief for the plaintiffs is inequitable.[469] States must adduce evidence about the fiscal impact

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459. Id.

460. Id.

461. Id.

462. Mateescu, supra note 37, at 13.

463. See Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 604 (1999) (plurality opinion) ("[T]he fundamental-alteration component of the reasonable-modification regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of . . . persons with mental disabilities.").

464. Eubanks & Mateescu, supra note 289.

465. See, e.g., State Associations Letter, supra note 301("We also note that repealing GPS would significantly increase the costs of implementing EVV. The changes proposed would further increase overall costs to the state and federal governments.").

466. See *Olmstead*, 527 U.S. at 603 (plurality opinion).

467. See 28 C.F.R. § 35.130(b)(1)(vii) (2023) ("A public entity, in providing any aid, benefit, or service, may not . . . limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.").

468. See Messier v. Southbury Training Sch., No. 3:94-CV-1706(EBB), 1999 WL 20910, at *11 (D. Conn. Jan. 5, 1999) ("Inadequate funding ordinarily will not excuse noncompliance with the ADA or Section 504.").

469. See *Olmstead*, 527 U.S. at 597 (noting that determining the viability of a fundamental alteration defense requires balancing various factors, including "the cost of providing community-based care[,] . . . the range of services the State provides others with

of amending their policies, including "unsuccessful attempts at fund procurement, evidence that [the state has] responsibly spent its budgetary allocations, . . . or the potential diminution of services for institutionalized persons."[470] They must also demonstrate a genuine commitment to bringing the EVV system into compliance with the integration mandate.[471]

Courts have also recognized that states create their own administrative systems and cannot avoid the integration mandate by binding their hands in their own red tape.[472] In *Steimel*, the Seventh Circuit rejected Indiana's argument that the methodology and criteria it was using to allocate waiver services were "'necessary for the provision' of the relevant services."[473] Arkansas has decided to implement a more restrictive EVV system than required by CMS. CMS has declared that GPS and geofencing, some of the most intrusive aspects of Arkansas's EVV systems, are not necessary to meet federal requirements.[474] A less restrictive EVV system would still permit the state to collect the information required by the Cures Act and would not fundamentally alter the state's programs, services, or activities.[475]

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mental disabilities, and the State's obligation to mete out those services equitably"); Fisher v. Okla. Health Care Auth., 335 F.3d 1175, 1182–83 (10th Cir. 2003) ("[T]he fact that [a state] has a fiscal problem, by itself, does not lead to an automatic conclusion that [the provision of prescription benefits] will result in a fundamental alteration."); Townsend v. Quasim, 328 F.3d 511, 520 (9th Cir. 2003) (finding that budgetary considerations are insufficient to establish a fundamental alteration defense and that the state had to prove that the asserted "extra costs would, in fact, compel cutbacks in services to other recipients").

470. See Pa. Prot. & Advoc., Inc. v. Pa. Dep't of Pub. Welfare, 402 F.3d 374, 383 (3d Cir. 2005) ("The presence of these additional factors . . . is required in order to credit an agency's fundamental alteration defense."); Haddad v. Arnold, 784 F. Supp. 2d 1284, 1304 (M.D. Fla. 2010) ("Beyond conclusory statements . . . Defendants have not shown how Plaintiff's cost analysis is flawed, how much an expansion of their provider network would cost, or why an individual must enter a nursing home facility for a certain period of time before Defendants realize any savings.").

471. *Haddad*, 748 F. Supp. 2d at 1305 (finding that the State had failed to show that it had a "comprehensive, effectively working plan," which it would need to show as a prerequisite to mounting a fundamental alteration defense).

472. See, e.g., Steimel v. Wernert, 823 F.3d 902, 918 (7th Cir. 2016) ("Our decision today does not require the state of Indiana to adopt any particular solution to make its waiver program compliant with the integration mandate. . . . But the state cannot avoid the integration mandate by painting itself into a corner and then lamenting the view.").

473. See id. at 916 (quoting 28 C.F.R. § 35.130(b)(8) (2016)).

474. See Ctrs. for Medicare & Medicaid Servs., Frequently Asked Questions: Section 12006 of the 21st Century Cures Act 5, https://www.medicaid.gov/sites/default/files/federal-policy-guidance/downloads/faq051618.pdf [https://perma.cc/GB7Z-AFKH] (last visited Oct. 5, 2023) ("CMS also notes that there is no requirement to use global positioning services (GPS), but it is one approach for implementation of the EVV requirements.").

475. *Steimel*, 823 F.3d at 916.

C. *Surveillance that Segregates Students With Disabilities*

1. *The ADA, Students With Disabilities, and Threat-Assessment Processes.* — A claim that threat-assessment processes violate the integration mandate must demonstrate that public schools are public entities within the meaning of the ADA and that students with disabilities are "qualified individuals with disabilities."[476] These are relatively straightforward inquiries. A robust body of law provides that public schools are public entities and that the provision of a public education falls within the definition of "services, programs, or activities" provided by a public entity.[477] The students particularly targeted by threat-assessment systems—namely, students who are receiving special education services under an IEP or have received and continue to receive mental health services—could easily demonstrate that they are qualified students with disabilities.[478]

2. *The Isolating and Segregating Effects of Threat-Assessment Processes.* — Courts have held that school districts have violated the integration mandate when they have excluded or removed students with disabilities from school-provided activities and programs. In *J.S., III ex rel. J.S., Jr. v. Houston County Board of Education*, the Eleventh Circuit held that persistently removing a student with a disability from his classroom because he was deemed "disruptive" violated the integration mandate and the Supreme Court's ruling in *Olmstead*.[479] The court held that the frequent exclusion and isolation from the classroom "implicate[d] those further, intangible consequences of discrimination contemplated in *Olmstead*," including "stigmatization and deprivation of opportunities for enriching interaction with fellow students."[480] In *K.M. ex rel. D.G. v. Hyde Park Central School District*, the Southern District of New York found that a student's being forced to eat lunch by himself could violate the integration mandate.[481] The court determined that this "needlessly relinquish[ed] participation in community life" and that "[e]ating lunch with other students could be considered an integral part of the public school experience, one in which D.G. would be entitled to participate if a reasonable accommodation for his disability would make it possible."[482]

476. See 42 U.S.C. § 12131 (2018).

477. See, e.g., Tennessee v. Lane, 541 U.S. 509, 517, 525 (2004) (listing public education as one of the sites of discrimination that Title II was seeking to address); K.M. ex rel. Bright v. Tustin Unified Sch. Dist., 725 F.3d 1088, 1097 (9th Cir. 2013) ("There is . . . no question that public schools are among the public entities governed by Title II.").

478. See, e.g., United States v. Georgia, 461 F. Supp. 3d 1315, 1328 (N.D. Ga. 2020) (finding that students with behavior-related disabilities funneled into the Georgia Network for Educational and Therapeutic Support Program were protected by the Title II of the ADA).

479. 877 F.3d 979, 983, 985–89 (11th Cir. 2017).

480. Id. at 987.

481. 381 F. Supp. 2d 343, 360 (S.D.N.Y. 2005).

482. Id.

Threat-assessment procedures give schools an informal way to remove students engaging in supposedly "problematic" disability-related behavior from school.[483] Practically speaking, once a school identifies a student as a substantive threat, the school can prevent the student from accessing the school campus altogether or participating in school activities.[484] In at least one state, schools can decide to remove a student without consulting anyone familiar with their disability-related needs.[485] Further, students face high barriers to reentering the school setting.[486] Reentry protocols after assessment as a threat are unclear, and students can miss significant amounts of school.[487] Threat-assessment processes can, therefore, result in students being excluded from school settings and provided with an

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483. Ctr. for C.R. Remedies at the C.R. Project, Ctr. for Disability Rts., Council of Parent Att'ys and Advocs., Daniel Initiative, Educ. L. Ctr., Nat'l Ctr. for Youth L., Fed. Sch. Discipline & Climate Coal., Nat'l Disability Rts. Network & Open Soc'y Pol'y Ctr., K–12 Threat Assessment Processes: Civil Rights Impacts 3 (2022), https://www.ndrn.org/wp-content/uploads/2022/02/K-12-Threat-Assessment-Processes-Civil-Rights-Impacts-1.pdf [https://perma.cc/ZFN4-DGZ8] [hereinafter K–12 Threat Assessment Processes].

484. See id. at 5–6.

485. See Model Behavioral Threat Assessment, supra note 311, at 10–11 ("Those that may be able to contribute to the threat assessment process include . . . representatives from the IEP team, where appropriate."). While Florida requires participation by "persons with expertise in counseling, instruction[,] . . . school administration[,] . . . and law enforcement," it does not require a student's IEP representative to participate in the threat-assessment process. Id.

486. Kara Arundel, Threat Assessments: Preventing School Violence or Creating Student Trauma?, K–12 Dive (Aug. 10, 2021), https://www.k12dive.com/news/threat-assessments-preventing-school-violence-or-creating-student-trauma/604658/ (on file with the *Columbia Law Review*) (describing concerns that students subject to threat assessments are rarely provided resources following the assessment); Advocs. for Child. of N.Y., Comment Letter on Request for Information Regarding the Nondiscriminatory Administration of School Discipline, Docket No. ED-2021-OCR-0068-0001, at 16 (July 23, 2021), https://www.advocatesforchildren.org/sites/default/files/on_page/ocr_comments_discipline_7.23.21.pdf [https://perma.cc/4MNK-3MGH] [hereinafter AFC, Comment Letter] (reporting that protection and advocacy agencies of various states have observed school districts engage in "risk assessments" that require parents to obtain an evaluation that confirms a student does not pose a risk before permitting the student to return to school).

487. See K–12 Threat Assessment Processes, supra note 483 (noting how threat assessments are used to impose "off the books" suspensions that circumvent "legally required due process" even though the procedures governing these practices are "vague"). The National Disability Rights Network provides an example of a tenth-grade student who was excluded from school indefinitely pending the results of a "threat assessment." Id. at 5. This caused him to miss almost a month of school without any alternative services in place, violating special education and civil rights laws. Id.; see also Arundel, supra note 486 (detailing informal removals of students with disabilities until the child is deemed to be not "risky"); Steven Yoder, Do Protocols for School Safety Infringe on Disability Rights?, Hechinger Rep. (Dec. 28, 2022), https://hechingerreport.org/do-protocols-for-school-safety-infringe-on-disability-rights/ [https://perma.cc/Z6H6-765F] (detailing other cases in which students were removed from the school setting while the school conducted a threat assessment and were ultimately prevented from returning to school).

education inferior to that received by their peers in a manner that violates the integration mandate.[488]

3. *Threat-Assessment Processes Violate the ADA*. — Public entities are excused from complying with the ADA regarding people deemed to pose a "direct threat" to others.[489] There are two things that are notable about the regulations pertaining to direct threat. The first is the requirement that the entity must conduct an individualized evaluation of the risk posed by the individual.[490] This evaluation must be "based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence."[491] The regulations prohibit public entities from making decisions that rely on "mere speculation, stereotypes, or generalizations about individuals with disabilities" rather than actual risks.[492]

The second is that a public entity must also consider how the individual could be accommodated to mitigate that risk.[493] That is, a public school must "ascertain[] the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk."[494]

Removal as part of threat-assessment processes can take place without the careful, individualized assessment contemplated by the ADA and its regulations.[495] Indeed, public entities may remove people based on *perceptions* of danger without first providing accommodations to ameliorate the risk.[496] The behavioral threat-assessment process involves

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488. See, e.g., Robert D. Dinerstein & Shira Wakschlag, Using the ADA's "Integration Mandate" to Disrupt Mass Incarceration, 96 Denv. L. Rev. 917, 937 (2019) (describing a pending class action suit in which Georgia was sued for violating the ADA's integration mandate after instituting a program segregating students with behavior-related disabilities).

489. 28 C.F.R. § 35.139(a) (2023).

490. Id. § 35.139(b).

491. Id.

492. Id. § 36.301(b).

493. Id. § 35.139(b).

494. Id.

495. See, e.g., AFC, Comment Letter, supra note 486, at 5 (reporting on a preteen student with emotional disabilities who had a history of making threats with no intention to carry them out and who was threatened with exclusion from the school until a threat-assessment evaluation was conducted); K–12 Threat Assessment Processes, supra note 482, at 3 (observing how threat assessments circumvent civil rights protections).

496. See, e.g., All. for Excellent Educ., Ctr. for Am. Progress, Educ. Tr., Educ. Reform Now, Nat'l Ctr. for Learning Disabilities, Nat'l Urb. League, SchoolHouse Connection, TeachPlus & UnidosUS, Comment Letter on Request for Information Regarding the Nondiscriminatory Administration of School Discipline, Docket No. ED-2021-OCR-0068, at 5 (July 23, 2021), https://downloads.regulations.gov/ED-2021-OCR-0068-3047/attachment_1.pdf [https://perma.cc/6DRJ-2DEF] ("We are deeply concerned that threat assessments may be used to label students as threats based on data that has no documented link to violent behavior, such as data on disabilities or those seeking mental health care.");

identifying "[c]oncerning behavior" that may not rise to the level of an actual threat.[497] Behavior that may attract the attention of threat-assessment teams include "increased absenteeism, withdrawal from friends or activities, changes in habits or appearance and other mental or emotional health concerns."[498] Without engaging in the careful threat assessment contemplated by the ADA, school districts that exclude students prior to conducting an assessment or require that a student obtain an evaluation demonstrating that they do not pose a threat before being permitted to return to school would not be able to rely on the "direct threat" defense.[499] Indeed, these practices circumvent the protections of and therefore violate the ADA and Section 504.[500]

CONCLUSION: QUESTIONING SURVEILLANCE, CENTERING INTEGRATION

Surveillance of people with disabilities is often described as being at best beneficial or at worst innocuous. This surveillance is frequently driven by laudable goals: to discharge a duty of care toward vulnerable people with disabilities, to conserve public resources, to protect school communities, and to funnel resources to where they are required. Practically, however, as this Essay demonstrates, disability surveillance can have a profoundly adverse consequence on the integration of people with disabilities into the community. Surveillance systems like cameras in group homes can result in community settings that resemble institutional settings. EVV systems can erode personal care services, placing people who require these services at risk of institutionalization. Threat-assessment teams in schools can result in a punitive environment for students with disabilities and in their removal from school settings.

How, then, can we center integration when developing policies and practices that depend on the surveillance of people with disabilities? This

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Off. for C.R., U.S. Dep't of Educ., Supporting Students With Disabilities and Avoiding the Discriminatory Use of Student Discipline Under Section 504 of the Rehabilitation Act of 1973, at 21 (2022), https://www2.ed.gov/about/offices/list/ocr/docs/504-discipline-guidance.pdf [https://perma.cc/75EG-5UJ8] ("[Risk] assessments are used to identify students who may pose a threat of physical violence to others at school or at school-sponsored events or to assess the level of risk that a student who previously engaged in serious misbehavior may pose to others in such settings.").

497. See, e.g., Model Behavioral Threat Assessment, supra note 311, at 12.

498. Id.

499. See K–12 Threat Assessment Processes, supra note 482, at 13–14 (describing the tension between federal laws, threat assessments, and constitutional due process protections for students with disabilities).

500. See AFC, Comment Letter, supra note 486, at 4 (noting that under the Individuals With Disabilities Education Act (IDEA) and Section 504, a student with unmet behavioral needs must be provided with supports and services and is entitled to the due process protections of those statutes).

is a crucial question to answer as we move toward a future where surveillance is part of the governing practice of modern society. While scholars have voiced concern about the surveillance creep and its potential to perpetuate and deepen social inequality, it is an "increasingly widely shared view that total surveillance might be 'necessary'" in some way for what Professors Torin Monahan and David Murakami Wood call "the onward progress of human civilization."[501]

In the face of this inexorable "progress," one question is whether surveillance systems actually solve the problems that prompt their use. For instance, are surveillance systems an effective solution to the chronic, systemic problem of abuse and neglect in group homes? Do they really keep people with disabilities safe within the community? One problematic consequence of a service-provision model that relies on the use of "granny cams" in group homes is that it presumes residents have family advocates with the "technical, social, and financial wherewithal to install and monitor cameras and the data they gather."[502] EMDs' potential to resolve a systemic problem is thus limited because not all people with disabilities have these support systems.[503] Effectively, these systems outsource the burden of safety and oversight to family members rather than the state—an untenable outcome. Rather, as argued above, systemic overhaul may be better achieved by implementing reliable incident-management and investigation protocols and quality-assurance mechanisms to assess the delivery of community-based services within group homes.[504]

A further question is about what surveillance systems may be displacing. Using surveillance systems to create order through rules and official procedures can displace the actual order—how people actually operate to get things done.[505] EVV technology and the rules that drive its

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501. Torin Monahan & David Murakami Wood, Editorial, Revitalizing Dissent: Imperatives for Critical Surveillance Inquiry, 20 Surveillance & Soc'y 326, 328 (2022).

502. See Levy et al., supra note 218, at 333.

503. See id. at 332–33 (suggesting that the utility of EMDs becomes limited when the "basic assumptions" upon which their rollout is predicated are not borne out, such as the presence of family members who can install, monitor, and respond to alert systems).

504. See, e.g., HHS, Joint Report: Group Homes, supra note 214, at 3 (recommending the implemention of "1. reliable incident management and investigation processes; 2. audit protocols that ensure compliance with reporting, review, and response requirements; 3. effective mortality reviews of unexpected deaths; and 4. quality assurance mechanisms that ensure the delivery and fiscal integrity of appropriate community-based services"); see also Ariz. Developmental Disabilities Plan. Council, Sexual Abuse of Arizonians With Developmental and Other Disabilities 1–2 (2019), https://addpc.az.gov/sites/default/files/media/2019%20ADDPC%20recomendations%20on%20preventing%20abuse_0.pdf [https://perma.cc/U78Q-X7LG] (recommending legislation to ensure that group home staff who work with people with disabilities are trained about what abuse and neglect mean and their obligations to report it).

505. See Karen Levy, Data Driven: Truckers, Technology, and the New Workplace Surveillance 152 (2023) ("[M]undane life . . . should be interfered with only on pain of screwing things up in a big way. To create apparent order, you kill the actual order. . . . [Y]ou

use clearly do not reflect the reality of people's lives and the way they use home health aide services. A common concern of personal care workers and individuals with disabilities is EVV's punitive lack of flexibility for providing home health aide services—services that, by their nature, are unpredictable and must be tailored to peoples' fluctuating, inconsistent needs. The use of EVV systems in this manner threatens to undermine hard-won protections that the disability community has fought for—in particular, the right of disabled people within the community to exert control over their services rather than being passive recipients of care.

We must also ask if surveillance systems respond to narratives about disability that are rooted in prejudice. Threat-assessment processes feed a popular but inaccurate public narrative linking disability and violence.[506] Perpetrators of violent behavior—like mass shooters—are deemed mentally ill by media and legislators.[507] This narrative has shaped the political response to incidents of gun violence in schools.[508] The reality, however, is that people with disabilities are more likely to be targets of violence than perpetrators.[509] Substance abuse and a history of exposure to violence and trauma are stronger predictors of shootings than psychiatric disability.[510] Mass violence is a result of a confluence of factors,

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efface the tacit mechanisms and social work-arounds that people use to get things done[.]" (second through fifth alterations in original) (internal quotation marks omitted) (quoting Harvey Molotch, Against Security: How We Go Wrong at Airports, Subways, and Other Sites of Ambiguous Danger 215–16 (2014))).

506. See, e.g., Lydia Saad, Americans Fault Mental Health System Most for Gun Violence, Gallup (Sept. 20, 2013), https://news.gallup.com/poll/164507/americans-fault-mental-health-system-gun-violence.aspx [https://perma.cc/A755-2NGY] (finding that 48% of Americans believe that the mental health system is "a great deal" to blame for mass shootings).

507. See, e.g., Tori DeAngelis, Mental Illness and Violence: Debunking Myths, Addressing Realities, Monitor on Psych., Apr./May 2021, at 31, 32 ("[A] growing body of research shows that when people with serious mental illness commit violent or aggressive acts, other factors besides the illness itself are often at play . . . .").

508. See Maria Konnikova, Is There a Link Between Mental Health and Gun Violence?, New Yorker (Nov. 19, 2014), https://www.newyorker.com/science/maria-konnikova/almost-link-mental-health-gun-violence (on file with the *Columbia Law Review*) (noting that the link between psychiatric disability and violence has, since the Gun Control Act of 1968, resulted in gun control laws that prohibit or otherwise restrict people with psychiatric and intellectual disabilities from purchasing firearms).

509. Katie O'Connor, Mental Illness Too Often Wrongly Associated With Gun Violence, Psychiatric News (June 15, 2021), https://psychnews.psychiatryonline.org/doi/full/10.1176/appi.pn.2021.7.23 [https://perma.cc/U9DK-3V8V].

510. In a 2002 study of more than 800 people across four states who were being treated for psychosis or major mood disorders, researchers found that almost 13% had committed a violent act in that year. Jeffrey W. Swanson, Marvin S. Swartz, Susan M. Essock, Fred C. Osher, H. Ryan Wagner, Lisa A. Goodman, Stanley D. Rosenberg & Keith G. Meador, The Social–Environmental Context of Violent Behavior in Persons Treated for Severe Mental Illness, 92 Am. J. Pub. Health 1523, 1523–24 (2002). The likelihood that they committed violence depended on whether they had experienced homelessness, lived in disadvantaged communities, or had suffered from violence themselves. Id. at 1528 (finding that, while no

and even proponents of threat-assessment processes acknowledge that youth who engage in violent acts are "'behaviorally and psychologically heterogenous'" and that "there is no profile or single 'type' of perpetrator of targeted violence."[511] Despite this reality, students with disabilities are disproportionately subject to threat-assessment processes, suffering severe legal consequences: incursions into their privacy, disruption to their education, and civil commitment or incarceration.

The ADA's integration mandate provides a lens through which to consider the impact of surveillance by compelling consideration of the lived experiences of people with disabilities and drawing attention to the downstream effects of surveillance systems and the way surveillance can generate negative stereotypes about disability. The integration mandate contemplates community as more than merely a locale framed in terms of negation. Rather, it is a change in mindset requiring meaningful opportunities to participate in the community and develop relationships.[512] This Essay demonstrates that failure to center integration in debates over the use of surveillance systems can result in a shallow and superficial conception of community, in which surveillance results in the exclusion and isolation of people with disabilities rather than their inclusion.

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variable stood out as "the primary explanation" for violence, people receiving treatment for severe mental illnesses were more likely to be violent if they had been exposed to violence and/or homelessness); see also Richard Van Dorn, Jan Volavka & Norman Johnson, Mental Disorder and Violence: Is There a Relationship Beyond Substance Abuse?, 47 Soc. Psychiatry & Psychiatric Epidemiology 487, 490–92 (2012) (finding, in a 2012 study of more than 34,000 individuals, that just under 3% of people with severe mental illnesses had engaged in violent behavior over the course of the year but noting that this risk was elevated when individuals also abused alcohol or drugs).

511. Marisa Reddy, Randy Borum, John Berglund, Bryan Vossekuil, Robert Fein & William Modzeleski, Evaluating Risk for Targeted Violence in Schools: Comparing Risk Assessment, Threat Assessment, and Other Approaches, 38 Psych. Schs. 157, 167–68 (2001) (quoting Herbert C. Quay, Patterns of Delinquent Behavior, *in* Handbook of Juvenile Delinquency 118, 118 (Herbert C. Quay ed., 1987)).

512. See Ben-Moshe, Contested Meaning, supra note 39, at 243–44 ("[I]f one defines 'community' as the building of human relationships and not locale of services, then the effects of what became to be known as 'community living' should be rethought and problematized given that one can be quite isolated while living 'in the community.'").

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